Summaries of
Decisions
Volume 13
(1984)

Commercial Registration Appeal Tribunal

Ontario

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Summaries of Decisions

Volume 13 (1984)

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS * - VOLUME 13

CITED 13 C.R.A.T.

* This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired, application should be made to the Registrar.

This volume includes Summaries of Decisions made under Liquor Licence Appeal Tribunal from January 1, 1984 to May 1984. The Tribunals merged to become Commercial Registration Appeal Tribunal effective May 18, 1984.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario, 1980, Chapter 274.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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C.K.W. ENERGY CORPORATION LTD.
and
ROBERT EDWARD KOLVEK
and
JAMES BRUCE CARVER
and
KAYE DON WHIPPLE

APPEAL FROM THE PROPOSAL OF THE DIRECTOR OF THE CONSUMER PROTECTION DIVISION OF THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS UNDER THE BUSINESS PRACTICES ACT

TO CEASE UNFAIR PRACTICE(S)

C.K.W. ENERGY CORPORATION LTD.
AND ROBERT EDWARD KOLVEK
AND JAMES BRUCE CARVER
AND KAYE DON WHIPPLE
Appellants

THE DIRECTOR OF THE CONSUMER PROTECTION DIVISION OF THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS
Respondent

ORDER AND DECISION

UPON the application to the Tribunal by the Appellants Robert Edward Kolvek as President and Director of C.K.W. Energy Corporation Ltd., Robert Edward Kolvek, James Bruce Carver and Kaye Don Whipple and the Respondent for issuance of a Consent Order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O., 1980, Chapter 484, and having read the Assurance of Voluntary Compliance dated the 1st day of February, 1984, and accepted the 21st day of February, 1984, to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Appellants Robert Edward Kolvek as President and Director of C.K.W. Energy Corporation Ltd., Robert Edward Kolvek, James Bruce Carver and Kaye Don Whipple and by the Respondent, filed and attached hereto;

NOW THEREFORE this Tribunal doth order that the proceedings in this matter be and the same are hereby disposed of without a hearing as against the Appellants on the basis of the terms and conditions set out in the Assurance of Voluntary Compliance attached hereto and which is expressly made a part of this Order and Decision.

DATED at Toronto this 28th day of February, 1984.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

John Yaremko, Q.C.
Chairman

IN THE MATTER OF the Business Practices
Act, R.S.O. 1980, Chapter 55

- and -

IN THE MATTER OF C.K.W. Energy Corporation Ltd.

- and -

IN THE MATTER OF James Bruce Carver

- and -

IN THE MATTER OF Robert Edward Kolvek

- and -

IN THE MATTER OF Kaye Don Whipple

ASSURANCE OF VOLUNTARY COMPLIANCE

WHEREAS the Director under the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, Chapter 274, as amended, did on the 7th day of October, 1983, propose to make an order, a copy of which is attached hereto, pursuant to subsection 1 of section 6 of The Business Practices Act, R.S.O. 1980, Chapter 55, as amended, (the "Act"), that C.K.W. Energy Corporation Ltd. ("C.K.W."), Robert Edward Kolvek ("Kolvek"), Kaye Don Whipple ("Whipple") and James Bruce Carver ("Carver"), collectively referred to as the "Parties", cease and desist from engaging in the unfair practices therein specified;

AND WHEREAS the Director did on the 7th day of October, 1983, issue reasons therefor and gave notice of both the proposed order and reasons, copies of which are attached hereto;

AND WHEREAS a copy of the proposed order, together with a copy of the reasons and notice thereof, were served on the Parties;

AND WHEREAS the Parties desire to enter into a written Assurance of Voluntary Compliance to cease and desist forthwith from engaging in the unfair practices hereinafter referred to and to otherwise comply with the requirements of the Act;

AND WHEREAS this assurance has been executed by the Parties solely for the purpose of these proceedings, commenced by the Director's proposed order dated the 7th day of October, 1983, and such assurance shall not be used for any other purposes except in proceedings under this Act;

AND WHEREAS the Parties waive any further procedural steps and in particular withdraw their request for a hearing before the Commercial Registration Appeal Tribunal;

AND WHEREAS this assurance has and shall be given for all purposes of the Act the same force and effect of an order made by the Director under subsection 1 of section 6 of the Act;

NOW THEREFORE the Parties do hereby undertake and agree to cease and desist from:

1. (a) engaging in the making of a false, misleading or deceptive consumer representation by representing directly through advertisements in the printed media, brochures and other sales literature and indirectly through the officers and directors of C.K.W., its agents, distributors, salesmen, representatives and employees that C.K.W. offers to the consuming public a product, Energizer 500 - a fuel and oil additive (the "Product"), which is capable of increasing gas mileage;

   (b) engaging in the making of a false, misleading or deceptive consumer representation by representing directly through its advertisements in the printed media, brochures or other sales literature or indirectly through the officers and directors of C.K.W., its agents, distributors, salesmen, representatives and employees that C.K.W. offers to the consuming public a Product which is capable of reducing pollution emissions, until such time as future independent testing of the Product yields results which are capable of supporting such a representation;

2. AND FURTHER the Parties undertake and agree to cease and desist from engaging in the making of a false, misleading or deceptive consumer representation by representing directly through its advertisements in the printed media, brochures and other sales literature and indirectly through the officers and directors of C.K.W., its agents, distributors, salesmen, representatives and employees, that C.K.W. offers to the consuming public a Product which "meets or exceeds all manufacturer's engine warranty requirements" or which in any way infers or implies that the Product complies with any manufacturer's engine warranty requirements with respect to engine oil drain

intervals and oil filter changes, until such time as future independent testing of the Product yields results which are capable of supporting such a representation.

3. AND FURTHER the Parties undertake and agree, on their own behalf and on behalf of the agents, distributors, salesmen, representatives and employees of C.K.W., to cease and desist from making any consumer representation of any kind whatsoever which are not already prescribed herein, in connection with the advertising, promoting, offering for sale, selling or distributing of the Product, for which neither C.K.W., nor its officers, directors, agents, distributors, salesmen, representatives and employees have any reasonable basis for making or dissemination thereof.

4. AND FURTHER the Parties undertake and agree not to furnish or place in the hands of their agents, distributors, salesmen, representatives, and employees the means and instrumentalities by and through which the public may be misled or deceived in a manner or by acts and practices which the Parties have agreed herein, without reservation, to cease and desist.

5. AND FURTHER the Parties undertake and agree to inform any person employed in the sale, promotion and distribution of the Product that C.K.W. will not use or engage or will terminate the use or engagement of any person or persons who do not agree to be bound by the provisions contained in the assurance herein. Any person who does not agree to be so bound shall not be used or engaged or continue to be used or engaged by C.K.W. to promote, offer for sale, sell or distribute any products bearing the name Energizer 500, now offered by C.K.W. or to be offered in the future. The Parties undertake and agree to inform all persons so engaged that C.K.W. is obliged by the assurance herein to discontinue dealing with or terminate the use or engagement of persons who continue on their own in deceptive acts or practices prohibited by this agreement.

6. AND FURTHER the Parties agree that the assurance herein shall be binding upon the Parties, their heirs, successors and assigns.

7. AND FURTHER the Parties acknowledge that failure to comply with any term of the assurance herein may constitute an offence under the Business Practices Act if so found by a court of competent jurisdiction.

8. AND FURTHER the Parties acknowledge that the Director may, upon any breach of the assurance by C.K.W., Carver, Kolvek and Whipple, jointly or severally, declare the assurance herein to be at an end and to immediately institute such proceedings and to take such action under the Business Practices Act as he may consider necessary.

9. AND FURTHER it is agreed that wherever any notice or communication is to be given in connection with the agreement herein, it shall be made, in the case of the Director, to the following address:

The Director
Business Practices Act
Ministry of Consumer and Commercial Relations
555 Yonge Street
Toronto, Ontario
M7A 2H6

and in the case of C.K.W., Carver, Kolvek and Whipple, shall be sent to the following address:

C.K.W. Energy Corporation Ltd.
192 Lavinia Street
Fort Erie, Ontario
L2A 2G3
Attention: Robert Edward Kolvek

IN WITNESS WHEREOF C.K.W., Carver, Kolvek and Whipple have hereunder affixed its corporate seal under the hand of its proper officer duly authorized on its behalf, in the case of C.K.W., and signatures on the 1st day of Feb, 1984.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

C.K.W. ENERGY CORPORATION LTD.
PER:

Signed "Robert Edward Kolvek"
Robert Edward Kolvek
President and Director

Signed "Robert Edward Kolvek"
Robert Edward Kolvek

Signed "Paul Leon"

Signed "J.B. Carver"
James Bruce Carver

Signed "Kaye Don Whipple"
Kaye Don Whipple

ACCEPTED THIS 21st DAY OF February, 1984.

Signed "R. Simpson"
R. A. Simpson
Director
Consumer Protection Division
Ministry of Consumer and
Commercial Relations

COLORBAR RESTAURANT INCORPORATED
(BABBAGE'S RESTAURANT)

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD TO APPROVE THE ISSUANCE OF A DINING LOUNGE LICENCE

IN RE: TOM JAKOBEK, Appellant

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
BARBARA SHAND, MEMBER
KENNETH VAN HAMME, MEMBER

COUNSEL: N. JANE PEPINO, representing the Appellant

KAREN WRISTEN, representing Colorbar Restaurant Incorporated

S.A. GRANNUM, representing the Liquor Licence Board

DATES OF MEETING: 13th and 22nd February, 1984

REASONS FOR RULING

On the 21st of July 1983, Colorbar Restaurant Incorporated (Colorbar) applied for a dining lounge licence for the premises at 2282 Queen St. East, Toronto.

1st November 1983 was the scheduled date for the operating of the Restaurant but the opening had been put off because of a Board Notice of Proposal to refuse issued 18th October 1983 and the subsequent Board hearing on 24th November 1983, because of objections.

On the 16th December 1983, the Board approved the issuance of the licence to Colorbar. The decision reads in part "....the licence may be issued after the Board has been advised that the premises comply with the relevant regulations under the Liquor Licence Act and, if there is no appeal of the Board's decision, after the time limit for the appeal".

On the 22nd of December 1983, Alderman Tom Jakobek, one of the persons who made representations to the Board against the issuance of the licence, appealed the Board's decision.

On the 27th December 1983, Colorbar began operating the Restaurant - "Babbages".

The date for hearing the appeal was proposed for the month of June 1984 but upon a representation made on behalf of Colorbar the hearing is scheduled for the 1st of May, 1984.

By letter dated the 11th of January 1984, Colorbar by its solicitors requested the Liquor Licence Appeal Tribunal "to exercise their discretion under Section 25 of the Statutory Powers Procedure Act, to grant...(the)..licence on a temporary basis, pending the outcome of this Appeal".

The ground for the request is that those associated with Colorbar directly and indirectly (for it is in toto a family operation) are in a precarious financial position in the interim period having invested some $600,000 in purchasing land, equipment and improvements and in certain ongoing operating costs , and in operating at less than capacity by virtue of not having a licence.

LAW

I. A licence issued under Section 4 or 5 expires two years after its issuance or latest renewal, subject to renewal by the Board in accordance with this Act and the regulations.
The Liquor Licence Act Section 7(1)

II. Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or court or other body to which the appeal is taken otherwise orders.
Statutory Powers Procedure Act, S. 25

III. The Liquor Licence Appeal Tribunal is an appellate tribunal.
Re: Canadian Pacific Express and Snow (1981) 31 O.R. (2d) 121 at 128

IV. The Liquor Licence Act does not 'expressly provide to the contrary....' and therefore, Section 25 of the Statutory Powers Procedure Act is applicable in this instance.

If the revocation or suspension of a licence were the issues then the Board order would take effect immediately unless the Appeal Tribunal grants a stay. Section 12(6) Liquor Licence Act

However, in the case of the issuance of a licence by the Board, an appeal therefrom operates as a stay unless the Appeal Tribunal otherwise orders.

V. Section 25(1) of the Statutory Powers Procedure Act makes it clear that the stay is the rule. The onus is on the applicant to convince the Tribunal that the stay should be removed.
Re: Schiller and Scarborough General Hospital (1972) 2 OR 2d 325.

The Tribunal is of the opinion that the Liquor Licence Act does not in itself give the Tribunal jurisdiction to issue a licence on a temporary basis pending the outcome of an appeal.

Colorbar is in effect asking for an order of the Tribunal under Section 25 that would nullify the appeal operating as a stay of the Order of the Liquor Licence Board related to the issuance of the licence, which, in the submission of Colorbar, would require that a licence be issued and the Restaurant be operable thereunder pending the outcome of the appeal.

Submissions have been made that Section 7(1) [I.-SUPRA] militates against an issuance of a temporary licence. In the light of its decision the Tribunal makes no comment with respect to such submission.

The Tribunal is of the opinion that it has authority under Section 25(1) to issue an order nullifying the operation of an appeal as a stay, that its discretion in this respect is unfettered but is limited to the exact action authorized by the section.

Colorbar submits that if the order is not granted and Colorbar is forced to continue to operate without a licence, Colorbar will be denied access to the hearing by the Tribunal because it will be out of business before the appeal is heard.

The Tribunal does not accept the submission as being an absolute result. The situation herein is not akin to where a person will have actually suffered a penalty pending an appeal which would be the case if for example a stay were not granted in the instance of suspension or revocation becoming effective before a Tribunal hearing can take place. The Tribunal is of the opinion that the situation herein is not that which would make Colorbar's right to a valid opportunity to have the Tribunal decide entitlement nugatory.

The persons associated with Colorbar commenced the operation in the full knowledge of the appeal process. A reasonable man would have known that the situation that arose could in fact arise. The situation is not such that was beyond the control of Colorbar. The Tribunal finds that the lack of sufficient cash flow creating the financial difficulties is the result of a business decision on the part of Colorbar in commencing and continuing operation. There is no doubt that Colorbar has financial problems. However, they would appear to be as much related to its state of capital and start-up costs as to operating costs; and ensuing concerns are also related to a disappointment of expectations, and a probable loss in investment.

The Liquor Licence Act spells out principles upon which licences are to be issued.

A far reaching change upon its enactment was that "an applicant is entitled to be issued a licence". However that entitlement was made subject to exceptions.

One exception is 6(1)(g):

> "in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located."

An applicant for a licence is disentitled to a licence if the issuance of the licence is not in the public interest. Persons representing the public interest are parties and may appeal the Board's decision. It is submitted that the community should not be forced to accept Colorbar's licensed premises until Colorbar's legal right to sell liquor has been established.

A proceeding before the Liquor Licence Appeal Tribunal is a hearing de novo. Section 14(3) of the Act requires the

Tribunal to hold a hearing. It is further submitted that the Appeal Tribunal should not direct the issuance of a licence until the hearing has been held and legal rights of the parties have been determined.

The Tribunal is being asked in effect to play a role in the establishment on a temporary basis, without a consideration of the merits of the matter, what it is called upon to do definitively at a full hearing at which time all aspects of the merits of the issues can be placed before it. The Tribunal is of the opinion that the conditions for such action must be more compelling then in the present instance. The Tribunal is of the opinion that Colorbar has not discharged the onus upon it. The evidence before the Tribunal is not such that in the interest of natural justice the order requested be issued.

The Tribunal accordingly denies the application.

D & F AGENCY LIMITED
(LICENSEE OF THE "10" EXECUTIVE RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE AND THEREAFTER
TO ATTACH A "TERM AND CONDITION" TO THE SAID LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
KENNETH VANHAMME, MEMBER

COUNSEL: FREDERICK A. McCOLMAN, its agent

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 19th January, 1984

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Order of the Liquor Licence Board of Ontario dated the 26th day of April, 1983, to suspend the dining lounge licence of the Licensee for a period of seven days and, upon completion of the said period of suspension, to attach a "TERM AND CONDITION" to the said dining lounge licence whereby the sale and service of alcoholic beverages shall cease at 11:00 p.m. daily, the said "TERM AND CONDITION" to remain in effect until the said licence holder complies with section 9, subsection 6 of Regulation 581/80 under the Liquor Licence Act and the Licensee makes application to the Board for its removal pursuant to section 9, subsection 2 of the said Act.

The Licensee is the holder of a Dining Lounge Licence No. 023453 issued on the 24th day of December, 1981. The premises licensed as a dining lounge consist of two areas on the second floor at 94-B Dunlop Street West, Barrie, Ontario, with capacities of 101 and 34 persons, respectively.

On the 24th day of March, 1983, the Liquor Licence Board issued a Notice of Proposal to suspend the said dining lounge licence for a period of 14 days and, upon completion of the said period of suspension, to attach a "TERM AND CONDITION" that the sale and service of liquor in the establishment shall cease at 11:00 p.m. due to the fact that the past conduct of the officers and directors of the Licensee afforded reasonable grounds for belief that the business of the restaurant would not be carried on in accordance with law, honesty and integrity, and that contrary to section 55(1) of the Liquor Licence Act, an officer and director of the Licensee corporation knowingly furnished false information to the Board in statements of sales of food and liquor required to be furnished to the Board pursuant to the regulations in that behalf. In addition, the Liquor Licence Board found that the sale of food in the licensed premises has been less than 40 per cent of the total receipts from the sale of liquor and food in the months of September, October, November and December in the year 1982 and the months of January and February in the year 1983, contrary to section 9, subsection 6 of Regulation 581/80 as amended by section 1, subsection 6 of Regulation 845/81 under the Liquor Licence Act. A hearing was requested by the Licensee and, as a result of that hearing, the Board issued its Order above referred to.

Counsel for the Board called as a witness Angus McGinnis, an Inspector for the Liquor Licence Board in the Barrie area, who testified that he had attended at the restaurant from time to time. His most recent visit was on January 18, 1984 at approximately 1:45 p.m., at which time there were 33 male customers in dining lounge number two and there was no sign of food being served to any of the customers. His visits to the premises in the evening indicated very little evidence of food being consumed. The witness advised that an investigation of the kitchen indicated that the kitchen was open and that food was available and that the kitchen was being staffed by one person. The witness testified that the staff consists of all girls except for a disc jockey. He also stated that the furniture in the dining lounge does not comply with the requirements of the Liquor Licence Act in that the tables were too small. He stated that on his last visit only 12 places were set up for dining in lounge number two and that there were no places set up for dining in lounge number one.

Stephen Holubko, an investigator with the Liquor Licence Board, was called as a witness on behalf of the Board. He submitted a report dated the 8th day of March, 1983 which was filed as an exhibit before the Tribunal. He investigated the ledgers for the six-month period from September 1, 1982 to February 28, 1983, and his investigation showed that the reports filed with the Liquor Licence Board differed substantially from the actual ledger statements showing the sales of liquor and food in the establishment. He stated that Mr. Kerr, one of the proprietors of the Licensee, admitted that the figures had been falsified. Mr. Holubko testifed that the keys on the cash registers report separately for beer, liquor, wine and food and that Mr. Kerr had admitted that it was the policy to use various food keys to ring through the sale of liquor and beer. The sales as reported for the above-referred to months were as follows:

Date	Total Liquor Sales (Percentage)	Total Food Sales (Percentage)
September, 1982	64.2	35.8
October, 1982	54.9	45.1
November, 1982	61.1	38.9
December, 1982	53.4	46.6
January, 1983	66.1	33.9
February, 1983	50.0	50.0

Mr. Holubko testified that his examination of the books of the Licensee indicated the actual sales were as follows:

Date	Total Liquor Sales (Percentage)	Total Food Sales (Percentage)
September, 1982	91.0	9.0
October, 1982	87.2	12.8
November, 1982	91.4	8.6
December, 1982	91.8	8.2
January, 1983	94.1	5.9
February, 1983	95.0	5.0

Mr. Holubko further testified that the cook in the premises only worked from 10:00 a.m. to 8:00 p.m. and that after that time only sandwiches were available. Little attempt had been made to develop food sales. Most menus were cards on the wall and no hand menus were available.

On cross-examination, Mr. Holubko confirmed that no attempt had been made to conceal the tapes or the monthly receipts. He stated that his last inspection was in the summer of 1983 and, at that time, there had been no difference in the manner of operation.

Mr. Frederick A. McColman testifed on behalf of the Licensee and confirmed that he was now the sole shareholder of the Licensee corporation and had purchased the interest of his former partner, Kerr. Prior to 1982, he testified that the food/liquor ratio was in order and it was only after the Licensee brought in exotic dancers that a substantial change in the food/liquor ratios occurred. There was filed before the Board a more up-to-date statement showing the present ratios and indicated that sales of liquor to food were now on a 70/30 basis. Mr. McColman testified that he now had a full time manager and that the kitchen is open at nights. He is attempting to promote food sales through coupons and package sales. He further testified that only 20 per cent of the tables in dining lounge number one did not comply with the minimum requirements of the Act and that such a discrepancy was allowed within the regulations. Mr. McColman confirmed that he had become the sole owner on November 1, 1983. He confirmed that he was fully aware of the ratio requirements under the Act, and on cross-examination, Mr. McColman confirmed that he was aware that the wrong food/liquor ratio figures were being submitted to the Board.

Counsel for the Board in argument stated that there were actually two separate issues. The first was the question of the suspension of the licence as a result of the filing of the fictitious figures in contravention of section 55(1) of the Act. He pointed out that the evidence with respect to this matter was not in dispute and that this was a very serious offence. The second issue dealt with the food/liquor ratio and Mr. Grannum pointed out that the said ratio had still not been achieved in accordance with the requirements of the Act. He said that there were many factors which indicated that no real attempt had been made to promote food sales and that the emphasis was on the sale of liquor and the entertainment provided in the nature of the exotic dancers. He argued that there was no evidence before the Tribunal to justify any change in the Decison of the Board.

Mr. McColman asked for leniency on behalf of the Licensee stating that this was a first offence and that his business would not exist without the dancers. He stated that it was his hope that the food/liquor ratio of sales would increase in the future, but he was not optimistic. He stated that an 11:00 p.m. closing would hurt both food sales and the business of the Licensee in general.

It is apparent to the Tribunal that the Licensee is in breach of the provisions of the Act in that false information was knowingly filed with the Liquor Licence Board in the food/liquor ratio requirements and that the Board is entitled to suspend the dining lounge licence pursuant to the provisions of section 10(3) of the Act. In addition, the Tribunal is faced with the fact that even at this time the highest ratio for the sale of food attained was only 30 per cent and this is a full ten per cent below the minimum required by the Act.

The Tribunal can see no reason why it should interfere with the Decision of the Liquor Licence Board. The Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 26th day of April, 1983 and directs the Board to set the date of commencement and termination of the said period of suspension. Thereafter, the Tribunal directs the Board to set the date of commencement of the said "TERM AND CONDITION".

ROCCO DI GIUSEPPE
(LICENSEE OF TRAMPS RESTAURANT & DINING LOUNGE)

APPEAL FROM THE PROPOSAL OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
DR. STUART ROSENBERG, MEMBER

COUNSEL: HOWARD S. BUCKMAN, representing the Appellant

S.A. GRANNUM, representing the Respondent

DATES OF HEARING: 29th December 1983, 20th March 1984,
3rd April 1984, 9th May 1984.

REASONS FOR DECISION AND ORDER

This is an appeal from the Notice of Proposal of the Liquor Licence Board of Ontario dated the 19th day of December, 1983, whereby the Board proposed pursuant to Section 10(3) of the Liquor Licence Act to revoke the dining lounge licence of the Licensee. On the same day, the Board issued an Order that the dining lounge licence be suspended in accordance with the provisions of Section 11(2) of the Act. The Appellant requested a Hearing pursuant to the provisions of Section 14(2) of the Act and, by an Order of the Tribunal dated the 29th day of December, 1983 with Consent, the interim suspension of the licence was lifted on certain terms and conditions pending the disposition of this Appeal.

The Appellant is the Licensee of the premises known as "Tramps Restaurant & Dining Lounge" located at 2362 Danforth Avenue in the City of Toronto, and was granted a dining lounge licence No. 020229, which licence was acquired in November of 1976. The Liquor Licence Board issued its Notice of Proposal to revoke the said licence pursuant to Section 10(3) of the Liquor Licence Act because, according to the Proposal, the past conduct of the Licensee affords reasonable grounds for belief that he has not and will not carry on business according to law. The Board was sufficiently concerned that it also, on the same date, issued an Order of interim suspension in accordance with the provisions of Section 11(2) of the Act.

The first witness called by Counsel for the Liquor Licence Board was Robert Harper who resides at 2350 Danforth Avenue, four doors west of the Tramps Restaurant. He gave testimony as to various occurrences over a period of approximately one year prior to the date of the Notice of Proposal herein, but most of the evidence of Harper was either hearsay evidence or evidence of events which could not be connected directly with the operations of the Licensee. He gave evidence as to events which occurred on 19 different days over the period from December 10, 1983 until March 10, 1984, and referred to many incidents of drunkenness, fighting, damage to his property and the property of adjoining premises. However, he was unable to directly connect any of these events with patrons coming from the Tramps Restaurant late at night and the Tribunal is unable to attribute any substantial weight to the evidence of Mr. Harper. The only item of significance was his testimony that during the period between December 19, 1983 and December 29, 1983 when the licence of the Licensee was temporarily suspended, Mr. Harper had no problems of any kind.

Counsel for the Liquor Licence Board proceeded to call 11 different police officers, each of whom testified as to various incidents which occurred between March of 1982 and April of 1984. All of the police officers were members of the Metropolitan Toronto Police Department. The first officer was Sergeant David Kuntz who testified that while on patrol in the early morning of June 25, 1982, he saw a girl walk out of Tramps with a glass of beer in her hand. It turned out that the girl, Nancy Sallus, was 16 years of age. The police officer testified that he spoke to Mr. Di Giuseppe who claimed that he had two doormen on duty but, notwithstanding this, the girl, an underage drinker, was permitted to leave the premises with a glass of beer. The officer confirmed that no charges were laid against the licensee.

The next officer to testify was Police Constable David Saunders who stated that he was familiar with Tramps Restaurant and was involved in an incident in the early morning of March 13, 1982 when he responded to a radio call. There was a large crowd in front of the premises and a man was lying on the street. Another man was cut. The police officer was advised that both men had been drinking in Tramps and had gotten into an altercation with the bouncer. A fight erupted and finally ended up in the street outside of the restaurant. The bouncer, Steven Thomas, was subsequently arrested and charged with bodily harm. He was convicted of the offence and sentenced to 60 days in jail. A certificate of the conviction together with pictures of the injuries suffered by the persons in the fight were entered as exhibits to these proceedings.

Police Constable Saunders also testified as to an incident in the early morning of December 15, 1983 when he received a radio call to investigate an alleged stabbing at Tramps Restaurant. When he attended at the premises he spoke with Mr. Di Giuseppe who was very unco-operative and denied that such an incident had occurred. He refused to identify any employee who was involved in a stabbing incident. The police officer confirmed that the employee, John Avery, was subsequently charged with attempted murder.

The next witness called on behalf of the Liquor Licence Board was Police Constable Barry Gerrard who testified with respect to an incident on March 2, 1983 when he was on plainclothes duty in Tramps Restaurant. The officer approached a patron who appeared to be under the age of 19 years and who stated that his name was Arsenault. The police officer testified that Mr. Di Giuseppe identified the patron as being known to him and had previously produced satisfactory evidence that he was of drinking age. Upon investigation, it was found that the patron was Donald Hines, born June 21, 1966, and was age 16 at the time. Hines was subsequently charged with drinking under age, but no charge was laid against the Licensee. Police Constable Gerrard testified with respect to one further incident when a female emerged from Tramps in a drunken condition and was subsequently charged with being drunk in a public place.

On cross examination, Police Constable Gerrard advised that he had no knowledge of the outcome of the charge against Donald Hines, but presumed that there had been a plea of guilty since he was never required to testify.

The next police officer who gave evidence was P.C. Robert Crabb who advised that he attended at Tramps Restaurant at 2:05 a.m. in the morning of September 15, 1983 with respect to a disturbance in front of Tramps Restaurant when seven or eight men were fighting. Most were in an intoxicated condition and one, Donald Cowie, was charged. Cowie confirmed that he had been drinking in Tramps and that the fight occurred as he was leaving the premises. The police officer confirmed that he did not actually see Cowie coming from the restaurant and acknowledged that he could have come from some other premises.

Robert Harper testified that on the early morning of September 29, 1983, he was on duty in a marked yellow police cruiser in front of Tramps Restaurant and was at that location because of numerous complaints. A group of between 12 and 15 people left the restaurant and proceeded in a westerly direction on the north side of Danforth Avenue. A large fight broke out and the two main combatants were subsequently arrested. The officer testified that both of the men were very drunk and they were part of the group who the officer saw leave the restaurant.

The officer testified, on cross-examination, that he had made several visits to the restaurant on September 29, 1983 and that, in his opinion, the fights on the street and damage to the property in the area were directly related to the behaviour of the patrons leaving Tramps Restaurant. These incidents mostly occurred about closing time. The officer was cross examined with respect to an illegal drinking establishment to the west of Tramps Restaurant referred to as a "booze can", but he testified that he had no direct contact with respect to those premises.

Timothy J. Montgomery was called with respect to an incident which occurred on January 5, 1984 at approximately 1:05 a.m. He was on his beat on Danforth Avenue when he observed a man leave Tramps and enter a pizza shop a few doors away. He stated that the man was very loud and rude to the proprietor of the pizza shop. The man was identified as one, William Penny, and the police officer charged him with intoxication in a public place. He stated that he had been on duty in that area for a considerable period of time and walked the beat on a frequent basis. He testified that he had never seen a doorman at the top of the stairs at the entrance to Tramps.

The next police officer called on behalf of the Liquor Licence Board was David S. Lowe who testified with respect to an incident which occurred on the evening of December 29, 1983, the first night after the lifting of the interim suspension by the Order of the Tribunal. He stated that he had been assigned duties for the period from July of 1983 to January of 1984 as a plain-clothes officer in the area and he had checked Tramps on various occasions. He confirmed that he had knowledge of the illegal "booze can" in the area. He also stated that he was aware of the conditions imposed by the Tribunal by its Order of December 29, 1983. Police Constable Lowe testified that he went to the premises at 10:40 p.m. on the evening of December 29 and that Mr. Di Giuseppe was at the downstairs entrance, but that nobody was at the upstairs door. There was some conflicting evidence with respect to the service of draft beer in jugs, but the Tribunal is not satisfied that the Licensee was in breach of any of the regulations of the Liquor Licence Act with respect to the manner of service of beer. Constable Lowe testified that during his inspection of the premises he noticed a male patron on the dance floor who appeared to be in a drunken condition and was apparently dancing by himself. He drew the attention of the bouncer to this patron and the patron was subsequently asked to sit down and then evicted. Constable Lowe stated that he had been investigating Tramps Restaurant for some time and, although some problems were caused by patrons of other establishments, including the "booze can", the majority of the problems resulted from the manner in which Tramps was operated. He felt that Mr. Di Giuseppe was too lax in his enforcement of the Liquor Licence Act regulations.

On cross examination, Constable Lowe confirmed that he had not been in the area since December 29, 1983 since he had been transferred to another unit and had no knowledge of any further problems happening since that time. He stated that, in his opinion, the biggest problem was that Mr. Di Giuseppe would try to enforce the regulations for a day or two but on a busy day the incidents would again occur and the same problems would return.

Counsel for the Board called as a witness David Saunders who testified that on January 21, 1984, he was in the vicinity of Tramps Restaurant in a marked car when, at approximately 10:15 p.m., he saw three men leave Tramps and walk in a westerly direction. One of the men had a bottle of beer in his hand and a second man deposited a beer bottle on the sidewalk. All three men were charged with public intoxication and one of the men was charged with having alcohol in an illegal place. On cross examination, the police officer reiterated that he actually saw the accused walk out of the door of the restaurant with the beer bottle in his hand.

Robert Copeland was the next officer who testified that he had attended at the restaurant on the evening of February 24, 1984 which was wet T-shirt night. The officer was on plain-clothes duty and he witnessed a male patron at the next table receive a bag of marijuana. The patron was charged with possession of marijuana and subsequently pleaded guilty. The officer, on cross examination, acknowledged that he was aware of the conditions imposed on the lifting of the temporary suspension of the liquor licence and had been in the premises approximately 12 times since January. He had never witnessed any other problems during that period. He also stated that he had never had an problem with Mr. Di Giuseppe, but that the main problem was with the clientele of Tramps Restaurant.

The next police officer to testify on behalf of the Liquor Licence Board was Robert MacDonald who stated that he was fully aware of the conditions contained in the consent Order dated December 29, 1983. He stated that on the morning of January 25, 1984 at approximately 11:25 a.m. he attended at the premises to determine whether food would be available between 11:00 a.m. and 2:00 p.m. in accordance with one of the terms and conditions of the Order. He said that the premises were not open at that time.

Constable MacDonald testified that on March 19, 1984 at 8:01 p.m. he received a radio call to attend at the pizza parlour just west of Tramps where two men who were alleged to be under the influence of alcohol had attacked the owner and his wife and they were subsequently charged. One of the bouncers of Tramps called Mike, when questioned by Police Constable MacDonald, advised that two people with beer bottles had come from the Wembley Hotel which was in the immediate area. Constable MacDonald testified that both accused were placed in separate police cars and each was separately asked where they had been drinking. He stated that each replied that they had been drinking in Tramps Restaurant. Constable MacDonald testified that he was aware of many incidents which had occurred with respect to Tramps Restaurant prior to December 29, 1983, and that he was attached to the criminal investigation branch and was on duty on the evening of December 15 when the alleged stabbing incident occurred. Constable MacDonald testified that a taxi had taken the victim to East General Hospital and that two police officers had seen the victim placed in the taxi. Constable MacDonald questioned a witness, Charles Rycroft, who testified that he had witnessed the stabbing in the restaurant. When Constable MacDonald questioned Mr. Di Giuseppe, he claimed that nothing had happened in Tramps and that if there had been a problem, it had occurred outside. Constable MacDonald tesified that the officers searched the lounge and found a blood stained T-shirt and blood stains on the door. He stated that Mr. Di Giuseppe was polite on the surface, but was very unco-operative and that it was only when he was advised that he might be charged with obstructing justice that he later admitted that some incident had happened in the lounge, but he did not know what. The police officer testified that the knife used in the stabbing was a steak knife which was taken from behind the bar. It appears that the person charged with attempted murder, namely, John Avery, was a former bouncer at Tramps but was not employed at the time of the incident.

Constable MacDonald testified that in April of 1983 when he was on plain-clothes duty, he was not known by the management of Tramps and was in the premises on an evening when there was a very large crowd. He stated that there was a doorman downstairs. He stated that many of the patrons were members of the Satan's Choice motorcycle club. He testified that the strippers who were performing at the time were not complying with municipal by-laws. The officer testified that two nights later he went back on what was called "wet T-shirt" night. He explained that the patrons bid for the right to wet down the T-shirts worn by the dancing girls. The officer testified that this was also contrary to the morality regulations and he confirmed that Tramps had been issued a municipal adult entertainment licence on a probationary basis.

On cross examination, Constable MacDonald testified that, in his opinion, there had been no honest attempt on the part of the Licensee to comply with the conditions contained as part of the Order for the consent adjournment of December 29, 1983. He stated that there was no proper security and that no patrols were maintained and that food was not properly available in the premises.

Counsel for the Board called as his next witness Steve Halubko, an investigator with the Liquor Licence Board for approximately five years. Mr. Halubko confirmed that he was aware of the conditions imposed on December 29, 1983. He stated that on January 12, 1984, he entered the premises at approximately 8:50 p.m. and that at that time only six tables were set up for dinner. He confirmed that food was available at that time. The witness testified that he returned on January 14, 1984 at 12:05 a.m. and was told that he could not gain admission as the premises were full. He stated that there was a patron standing by the cloakroom who was intoxicated leaning against the wall. He stated that the doorman asked another patron who was waiting in the lineup if there were any police cars outside. When he was advised that there were no police cars, the doorman stated that it was a good time to get the impaired patron out. Shortly after that, the doorman let all of the people waiting in line into the premises.

Mr. Halubko testified that he returned to the premises on the late morning of January 16, 1984, but that they were locked at 11:20 a.m. He reattended at 1:35 p.m. and the premises were still locked. He testified that on the many occasions that he had been in the premises there was no real attempt to serve food and that the liquor sales appeared to make up in excess of 90 per cent of the total sales in the premises.

On cross examination, Mr. Halubko testified that he saw some food served when he was in the premises consisting of three orders of chicken. He stated that the only menu was a handwritten menu which was filed as an Exhibit to these proceedings. He stated that on the evening of January 14 Mr. Di Giuseppe was doing some policing at the door, but that when the last call was given at 12:45 a.m. people were still waiting and he let them all into the lounge at that time. Mr. Halubko confirmed that he was fully aware of the conditions imposed on

December 29, 1983 as terms of the adjournment and the lifting of the temporary suspension and he stated that at no time did he see any doorman or security staff on the exterior of the premises. He stated that he had no knowledge of non-compliance with respect to the other conditions except with respect to his evidence of the dirty washrooms. Mr. Halubko stated that he was of the opinion that the Licensee should know how to operate the premises in accordance with the requirements of the Liquor Licence Act and that there was only a partial effort to comply.

The next witness called on behalf of the Board was Leslie Hebbard who was an investigator with the Liquor Licence Board. He stated that the he was instructed to visit Tramps Restaurant and, on February 22, 1984, he made three visits to the premises. At shortly after noon on that date he found 25 patrons in the premises mainly dressed in blue jeans. The only food being consumed was three persons sharing a large order of ribs and a fourth person sitting by himself eating a mini-pizza. He stated that the premises were dark and that loud music was being played. He confirmed that there were menus on most tables. Mr. Hebbard testified that he ordered a beer and an order of chicken wings and it took 50 minutes for the chicken wings to arrive. The waitress apologized for the delay and gave him a free beer. He left at 1:55 p.m. and, during that period of time, no other food was sold. He stated that only five tables were set up for dining with tablecloths. He inspected the washrooms and found them to be generally acceptable except for a lack of water in a hand basin.

Mr. Hebbard returned to the restaurant at 6:05 p.m. on February 22 and, at that time, there were 17 patrons in the premises, all of whom were drinking and none of whom were eating. He remained in the premises until 7:30 p.m. and at the time that he left there were 14 patrons. Mr. Hebbard returned to the premises at 8:50 p.m. and, at that time, there were 23 patrons in the premises, all of whom were drinking, and no food was served. There was a doorman on duty at the lower level. At 9:00 p.m. all of the tables were stripped of tablecloths and place settings. Mr. Hebbard testified that he left the premises at 9:30 p.m., at which time there were 28 patrons in the premises and he saw no food of any kind served during the evening. On cross examination, Mr. Hebbard advised that he had never spoken to the Licensee. He confirmed that he had been requested to make these inspections by his supervisor. In his opinion, the staff was not used to serving food because of the length of time to prepare the chicken wings order. He confirmed that he saw no other evidence of a free beer having been given.

The next witness called on behalf of the Board was Gregory Proctor of the Metropolitan Toronto Police Force. He testified that he attended at Tramps Restaurant on the evening of March 23, 1984 at approximately 11:00 p.m. He was in plain clothes and was parked on the north side of Danforth Avenue. He testified that he and his partner, Peter Coulis of the Morality Squad, proceeded down the stairs into the restaurant and were required to check their coats. He was seated at the bar and there were mostly young people at the bar. He noticed a table of six or more people who were seated close by and who began smoking marijuana and passing it around to all of the people at the table. The officer testified that he was in the bar for approximately one and one-half hours and that a man in an apparent drunken condition was dancing by himself on the dance floor for the whole time. He also testified with respect to an incident where a man in an apparent drunken condition attempted to join another couple who were seated at another table and who he did not apparently know. His attempts were repulsed, but none of the employees in the premises attempted to interfere with the two drunken men. The officer testified that the man who was dancing by himself made three trips to the bar and was served on each occasion. He stated that he and his partner left the bar at approximately 12:30 a.m. and that a number of young people who in his opinion were under the age of 19 years were standing around the bar at that time.

On cross examination, Proctor confirmed that he made no attempt to determine the age of the young people who he thought appeared to be under the age of 19 years and that no charges were laid. He stated that he and his fellow officer did not wish to identify themselves, but that in his opinion if he had wished to identify himself, he could have laid several charges including a charge with respect to the marijuana, re the drunkenness and re the serving of drunks. The officer testified that the only food that was served in the premises during the one and one-half hours when he was there was a birthday cake which had been boxed and had apparently been brought into the premises by a patron. Coulis confirmed the evidence of Proctor and the only new testimony of Coulis was with respect to two young girls who were sitting at an adjoining table in Tramps. He stated that a waiter approached and asked for proof of age. He stated that birth certificates were tendered by the girls and were accepted as sufficient evidence. In his opinion, Police Constable Coulis stated that the girls were under the age of 19 years. He confirmed that he did not attempt to challenge the age of the girls.

Counsel for the Licensee called as his first witness Police Constable Dennis Skrepnek of the Metropolitan Toronto Police Force. He confirmed that he had visited Tramps Restaurant on January 26, 1984 as an under-cover agent for the purpose of checking on the service of food and menus. He stated that he was handed a menu at that time and ordered an order of lasagna and a beer which was served to him. He confirmed that the disc jockey in the premises was plugging pizzas and chicken wings at the time and that doormen were on duty. On cross examination, Constable Skrepnek stated the lasagna was the type purchased in a can. He stated that there were about 30 other people in the premises at the time and that no other patrons were eating.

The next witness called on behalf of the Licensee was Roger Oliver who was a liquor licence inspector for approximately 11 years and his district included the Danforth area where Tramps Restaurant was located. He had been responsible for inspections at Tramps since September of 1983. He stated that his duties and responsibilities as an inspector were to carry out the provisions of the Liquor Licence Act and that the patrons were treated fairly. In addition, he was responsible for compliance with the fire safety regulations. He stated that since September of 1983, he had made seven spot inspections and one annual inspection. His inspection of the premises confirmed that the dining lounge was in an acceptable condition, all signs were proper, the kitchen and food handling areas were open at the time of the inspection and that people were working in the kitchen. His annual report indicated that the general operations of the dining lounge were acceptable. He had no knowledge of the food/liquor ratios and had made no investigations with respect to that. He confirmed an infraction with respect to a blocking of a fire exit at the rear of the premises which was impeded. Mr. Oliver stated that he could not recall having been advised of the conditions imposed on December 29, 1984 relative to the lifting of the temporary suspension.

The next witness called on behalf of the Licensee was Cecil Thordarson who was employed by Tramps commencing in January of 1984. He had had previous experience as a manager of five restaurants with exotic dancers and his last employment had been in Brampton. He was hired as a doorman and was not involved in the hiring of other security people. He stated that his responsibilities were to be stationed at the front door at the base of the stairs and to check the bar, the dance floor and the washrooms. He testified that from 11:00 a.m. to 4:00 p.m. the staff consisted of one doorman plus the manager, but in the evening there would be three or four doormen on duty, one being at the top of the stairs inside the door at night. He stated that after the last call the security staff were given walkie-talkies and that the function of the outside doorman at closing was to be sure that there was no congregation in the stairway or outside the door at the top of the stairs. He stated that there was no real problem with people having too much to drink but, if there was a fuss, he would call the police. On cross examination, Mr. Thordarson confirmed that he had been hired because of prior trouble. He was referred to the March 23 incident with respect to the solo dancer. He stated that his patron came in every weekend and danced by himself, but that he was not intoxicated. He confirmed that there was a fair lunch business and that lunch was served mainly between 11:00 a.m. and 1:00 p.m. He stated that his responsibility as a doorman was to check the washrooms every 20 minutes and the washrooms would be cleaned every day before the opening of the premises at 11:00 a.m. He confirmed that he had caught about six different people with drugs and this resulted in automatic ejection from the premises.

The next witness called on behalf of the Licensee was John Spadaro who was employed as a disc jockey for seven months and his hours of employment were from 11:00 a.m. to 6:00 p.m. He worked in the DJ booth and received instructions from management including a two-page sheet announcement which contained reference to the food being served. He stated that this was read every halfhour through the public-address system. He stated that he sometimes helped in the kitchen preparing food before 11:00 a.m. He stated that there had been some improvement in food service during the seven months that he had been employed at Tramps and that the finger food sales had increased substantially. He stated that there was no finger food prior to December of 1983.

Counsel for the Licensee proceeded to call four additional witnesses, three of whom were waitresses and one who was the head of security. All of the witnesses gave evidence to confirm the service of food, the setting up of tables, and testified as to the strict requirements with respect to proof of age and the restrictions imposed by management relating to service of patrons who apparently had too much to drink. They all testified as to the improvement of the food service since the introduction of finger foods and "munchies". Alexander Moran, the witness who was the head of security, confirmed that there were always many police cars around the premises and that there was an outside doorman on many occasions at the time of closing. He stated that the outside doorman would only go downstairs after the crowd had dispersed.

Rocco Di Giuseppe, the Licensee of Tramps Restaurant, testified that he acquired the restaurant in June of 1975 when it was an old pool hall and renovated the building and obtained his liquor licence in 1976. He testified that the dining lounge had contained a dance floor since the beginning and that it was a restaurant and tavern with a disc jockey. He testified that all Liquor Licence Board inspectors were very helpful to him and he always attempted to co-operate with them. He stated that his relationship with the Metropolitan Toronto Police Department started off very well, but that there appeared to be a change in attitude. He stated that his problem with the police arose after an unpleasant relationship with two plain-clothes officers who took a negative approach to his operations and began to harass him. He stated that he was convinced that this led to the Liquor Licence Board's surveillance. The monitoring of his premises in 1982 indicated a 37/63 ratio at a time when the regulations required the food/Liquor ratio to be 50/50. Mr. Di Giuseppe testified that he had complied with all of the requirements of the Order of the Liquor Licence Appeal Tribunal dated January 12, 1982, and that there had been proper reporting procedures followed since that time.

Mr. Di Giuseppe testified that in his opinion the Order for immediate suspension issued by the Liquor Licence Board on December 19, 1983 resulted from the alleged stabbing incident on December 15. He testified that the people involved left the premises on their own and that no employees were involved. He stated that the blood stained T-shirt had resulted from a bleeding nose and had nothing to do with the alleged stabbing. He contradicted the testimony of the police officers. Mr. Di Giuseppe said that he had had no convictions with respect to serving underage patrons and that there had been no charges laid with repect to permitting drunkenness. He stated that in his opinion security was always under control and that the December 15, 1983 stabbing incident was only an isolated incident and the first major incident in eight years. He then dealt with the various conditions imposed on December 29, 1983 by this Tribunal and testified that he had complied with all of these conditions. He hired four extra doormen for the purpose of additional security and gave specific instructions to his security people. He stated that usually there was a man at the top of the stairs inside the doorway and one at the bottom. In addition, there would be one security man patrolling the aisles of the lounge and one at the back of the room. He stated that the dispersal of crowds after closing time was a problem because of the pizza parlour in the area which was open until 3:00 a.m. He stated that it was not his responsibility to disperse the crowds on the street.

Mr. Di Giuseppe testified that Condition No. 2 relating to the prohibition of persons who were involved in the incident of December 15 was complied with and, in addition, they had ceased to offer promotional items. He stated that the isolated incident with respect to the giving of a free beer to the undercover police officer was merely a good gesture on the part of the waitress and that he had never authorized free beer to anybody. He testified that he had made every effort to clean up the washrooms, but that they do tend to become dirty towards the end of the evening. With respect to Condition No. 5, Mr. Di Giuseppe testified that he misunderstood the condition at first with respect to the requirement for an 11:00 a.m. opening. He stated that he began to open at 11:00 a.m. one week after he had received the adult entertainment licence from Metropolitan Toronto which was sometime in January of 1984. He produced as exhibits invoices with respect to the purchase of food and linen supplies including the supply of tablecloths. He testified that he had fully complied with the requirements of Condition No. 5 and that he was meeting his food/liquor ratio in a proper manner. He stated that all of his security people were required to insist on age of majority cards as the only evidence of age which was acceptable for the service of liquor on the premises.

Mr. Di Giuseppe testified that he was surprised with the evidence of the William Penny incident and that Mr. Penny was a regular customer who had never caused any trouble and that he had never seen him in an intoxicated condition. He stated that he made every possible effort to comply with the requirements of the Liquor Licence Act.

On cross examination, Mr. Di Giuseppe was questioned with respect to the prior ratio problems that he had had which led to the Decision and Order of January 12, 1982. He confirmed that one condition, namely the issuance of separate guest checks, had not been complied with, but that the waitresses did give a receipt. When questioned, he was not specific with respect to the type of receipt but confirmed that there was a problem with the giving of guest checks.

On cross examination, Mr. Di Giuseppe confirmed that Vernon Love was an employee of Tramps and acknowledged the certificate of conviction with respect to the serving of a minor. He also confirmed that Linda Yielding, who was an employee, pleaded guilty to the serving of a minor but that she was dismissed thereafter. He confirmed that Steven Thomas was an employee of the premises who was convicted of an assault charge outside of Tramps. All of the certificates of conviction were filed as exhibits. With respect to the incident of December 15, he confirmed that there had been an altercation and that a table had been turned over. He stated that two doormen were involved, but he felt that they had the situation under control and he stayed where he was. He did not investigate but he did call the police after everybody had left.

Mr. Di Giuseppe testified that the customer who danced by himself did not annoy anybody and never did drink a lot and that he had never been arrested. He only had him ejected from the restaurant on the request of the police. Mr. Di Giuseppe was shown a newspaper advertisement which appeared in the Toronto Sun advertising Tramps Restaurant, but it stressed the adult entertainment and not food sales. The only reference to food in the advertisement was the one cent lunch coupon which was included as part of the advertisement and Mr. Di Giuseppe was questioned on what the effect of such an offer would be on his food/liquor ratio.

The last witness called on behalf of the Licensee was Raymond Michael Tanacan who had been employed by Tramps for a period of two years and became the general manager in the latter part of 1983. He stated that he was the manager at the time of the temporary suspension. He stated that his previous experience as a private investigator had enabled him to establish proper security methods for the premises. He stated that he started duties at 8:00 a.m. daily and prepared the equipment for the cleaning staff. He would also prepare the broths in the kitchen which would be used for some of the finger foods and was generally responsible to prepare the premises for the 11:00 a.m. opening. His responsibilities from 11:00 a.m. to 6:00 p.m. were to oversee the total operations. He stated that Mr. Di Giuseppe was often away during the daytime. He confirmed that at 6:00 p.m. the adult entertainment ceased and anything associated with it would be removed and the premises would be set up for dining. He stated that he had made attempts to reduce the problems after closing by attempting to arrange for cab companies to have cars in the area, but that the cabbies were not always co-operative. He stated that after closing, depending on weather conditions, his staff would attempt to maintain control but that people would linger at the pizza parlour and wait for the illegal "booze can" to open. He stated that he would be challenged by patrons when he asked them to move because he had no authority to control them on Danforth Avenue. He stated that in his opinion the premises were not disorderly and were operated in a proper manner.

Mr. Tanacan testified that there had been a surprise check by the Department of Health of the City of Toronto and that they had found the kitchen area to be unhealthy due to a poor exhaust system. A larger ventilation system was required and this was installed immediately. He confirmed that it was a mistake on his part that the undercover police officer received a free beer. He stated that there was a delay of service in the kitchen because of a problem with a fuse and he gave the order to give free beer to patrons who were delayed in their food service. He testified that he had been in the Wembley Tavern and that they had problems with fights and unruly patrons and that he felt that the police took a different attitude with respect to Tramps and were far tougher on them than they were on other premises in the area. He stated that in his opinion the Metropolitan Toronto Police were placing Tramps under a microscope and that Mr. Di Giuseppe was knocking his head against a cement wall.

On cross examination, Mr. Tanacan confirmed that he was present on December 15, 1983 at the time of the stabbing incident and was in the back of the premises. He stated that two police officers were just arriving at the time of the altercation and that the victim was ushered out. He disagreed with the evidence given by the police officers as to what had happened to the victim after the stabbing. He confirmed that there had been advertisements with respect to a one cent luncheon but that there were few results from such an advertisement. He had no recollection of a beer and chicken wing special which was also advertised. The witness stated that in his opinion there were few problems with respect to excess drinking and he felt that it was not the responsibility of the proprietor of the premises to have to limit a patron to two glasses of beer per meal. He stated that there was no average as to what would be a proper amount to serve and that he was aware of some patrons who could drink as much as 16 beers and eat four large orders of chicken without being intoxicated in his opinion. He confirmed that the present kitchen staff consisted of one part time cook who started at 10:00 a.m. and left on his instructions.

Counsel for the Liquor Licence Board argued that the Board had exercised its authority to issue an Order for interim suspension of the dining lounge licence on December 19, 1983 because of the information made available to the Board from its own investigations and from the Metropolitan Toronto Police Department. It was argued that this was a very serious step and was only taken when circumstances warranted immediate action. It appears that the stabbing incident of December 15 which was referred to by many witnesses and resulted in a charge of attempted murder caused the prompt action on the part of the Board. It was argued that the Board had lost confidence in the ability of the Licensee to properly manage the licensed premises. Counsel referred to the past undertakings given by the Licensee with respect to the sale of food in 1982 and the Decision of this Tribunal which imposed these conditions. It was argued that the Licensee had been in business since 1976 and should know how to properly run a dining lounge. Counsel for the Board then referred to the many incidents which occurred after the lifting of the temporary suspension on December 29, 1983, and he argued that this rash of new incidents could only be explained by either a complete disregard by the Licensee of the rules and regulations of the Board or, in the alternative, a continuing inability on the part of the Licensee to control the patrons of his establishment. He referred to the fact that since the Licensee had obtained an adult entertainment licence he was no longer interested in selling food and had a complete disregard for the food/liquor ratio as required by the Board. He stated that it was hard to believe that when the premises featured exotic dancers from 11:00 a.m. to 6:00 p.m., they could transform the dining lounge into a family dining restaurant at 6:00 p.m. He referred to the evidence of many witnesses confirming the lack of sale of food in the premises and the stressing of the sale of beer and liquor. He stated that the Licensee had clearly demonstrated, even after the temporary suspension, that he had a lack of ability to operate a dining lounge in accordance with the Liquor Licence Act and its regulations.

Counsel for the Appellant argued that the Tribunal must focus on the actual evidence before December 19, 1983, but that the evidence subsequent to December 29 should focus on the question of compliance with the terms and conditions laid down on that date relating to the lifting of the temporary suspension. He made reference to the Notice of Proposal issued on December 19, 1983 by the Liquor Licence Board which made reference to 80 incidents in or near the licensed premises and he stated that there was no evidence with respect to 80 incidents. He referred specifically to the stabbing incident of December 15, 1983 and submitted that this had been a complete overreaction on the part of the Board resulting in the temporary suspension. He argued that there were not sufficient grounds for a temporary suspension at that time.

Counsel then dealt with the question of compliance with the terms and conditions laid down on the lifting of the temporary suspension and argued that the evidence indicated that the said terms and conditions had been substantially complied with. He stated that there was no evidence whatsoever showing that the Licensee was failing to meet its proper food and liquor ratio and that the type of food sold should be of no concern. He argued that most of the incidents occurred outside of the premises and after the premises had formally closed. He argued that there were only six incidents referred to in evidence up to and including December 19, 1983 and that the stabbing incident of December 15 resulted in an increase in the provision of security. He argued that most of the evidence was either hearsay or evidence of incidents which occurred outside of the licensed premises and beyond the control of the Licensee. He argued that based on the evidence of incidents up to December 19, 1983, there were no grounds for the Board to either suspend or revoke the licence and that since that time Mr. Di Giuseppe had successfully passed his probationary period.

The Notice of Proposal issued by the Liquor Licence Board on December 19, 1983 to revoke the licence of the Licensee is a very serious matter and is the most severe penalty that can be imposed by the Board. However, the Tribunal finds that this penalty is fully justified in these circumstances. The Licensee has operated the dining lounge for over seven years and there is no excuse for failure to fully understand the responsibilities of a Licensee and what is required to comply with the Liquor Licence Act and its regulations. The stabbing incident of December 15, 1983, a most serious matter, illustrated to the Tribunal the lack of co-operation on the part of the Licensee which could be construed as an obstruction of justice. It is apparent from the evidence that the Licensee, having obtained a temporary adult entertainment licence from Metropolitan Toronto, has completely changed the premises from that of a dining lounge to that of providing adult entertainment. Either the Licensee is unable to control the actions of his patrons and control the amount of alcohol consumed by some of these patrons on his premises or he does not want to do so. The evidence before the Tribunal covers a period from 1982 to April of 1984 and one would have thought that the Licensee would, after the interim suspension, operate his restaurant in a manner beyond reproach. The fact that there were eight separate incidents which occurred subsequent to the lifting of the temporary suspension on December 29, 1983 is sufficient to indicate a failure on a permanent basis on the part of the Licensee to operate the premises according to law.

The Tribunal, therefore, confirms the Notice of Proposal issued by the Liquor Licence Board of Ontario dated December 19, 1983 to revoke the dining lounge licence of the Licensee and authorizes the Board to set the effective date of such revocation.

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

448163 ONTARIO LIMITED
(LICENSEE OF GRAY'S LAKEHOUSE RESTAURANT)

APPEAL FROM THE DECISION OF THE LIQUOR LICENCE BOARD

TO SUSPEND THE DINING LOUNGE LICENCE FOR A PERIOD OF THREE DAYS AND UPON COMPLETION OF THE SAID PERIOD OF SUSPENSION TO ATTACH A "TERM AND CONDITION" TO THE SAID LIQUOR LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
NEIL VOSBURGH, MEMBER

COUNSEL: JOHN T. CLEMENT, Q.C, representing the Appellant

S.A. GRANNUM, representing the Respondent

DATE OF HEARING: 5th June, 1984

REASONS FOR DECISION AND ORDER

This is an Appeal from the Decision of the Liquor Licence Board of Ontario dated the 10th day of January, 1984, whereby the Board ordered the suspension of the dining lounge licence of the Licensee, 448163 Ontario Limited, in respect of Gray's Lakehouse Restaurant, 15 Hurontario Street, in the City of Mississauga, in the Province of Ontario, for a period of three days and, upon completion of the period of suspension, the further Order of the Board attaching a "Term and Condition" whereby the sale and service of alcoholic beverages in the licensed premises shall cease at 12:00 midnight, Monday to Saturday inclusive.

There is no dispute as to the facts and this Appeal is with respect to penalty only. As a result of an investigation by the Board, particulars of which investigation are set out in two reports dated October 25, 1983 and November 8, 1983, and which material was filed as part of the record in these proceedings, it was established that the actual sales of liquor and food in accordance with the daily journal of the Licensee differed substantially from the sales figures submitted to the Board as required by the Liquor Licence Act and its Regulations and it was acknowledged that the figures submitted to the Board had been falsified. In addition, an examination of the proper figures disclosed that the total food sales for the licensed premises for the period from October of 1983 to April of 1984 indicated that the Licensee was not complying with the requirements of Section 9(6) of Regulation 581 of the Act which requires minimum food sales in any month to be not less than 40 per cent of the total receipts from the sale of liquor and food in that month. Evidence filed with the Tribunal on behalf of the Appellant indicated that the total food sales for the month of May, 1984 represented 40.4 per cent of the total sales of food and liquor and this would be the first month in which the Licensee had complied with the Regulation for some period of time.

Mr. Clement, on behalf of the Appellant, acknowledged that Mr. Vincent who was the manager of the licensed premises directed the bookkeeper to submit incorrect figures, but that this had been done because they wanted to stay in business. Food sales were down as a result of an adverse article which appeared in the Toronto Star which adversely affected the dining room operations for some months. Mr. Clement referred to the Decisions of the Board in various unnamed Appeals where there had been no suspensions issued and he submitted that the Board had been too severe on the Licensee. He argued that not enough attention had been paid to the fledgling status of the operation which had only been commenced in September of 1982. Mr. Clement also pointed out that the Licensee had retained a senior accounting firm in the summer of 1983 to maintain proper accounts at all times.

Mr. Clement argued that the penalty with respect to the imposition of the "Term and Condition" did not reflect the positive results achieved by the Licensee in recent months in increasing the food sales and finally achieving a proper ratio in May of 1984. He referred to Section 15(2) of that Act which grants a reasonable opportunity to the Licensee to comply. He submitted that the Licensee had made an honest and true attempt to comply and that to continue the "Term and Condition" requiring a closing at 12:00 midnight from Monday to Saturday inclusive would impose a very serious financial penalty, both on the Licensee and the 22 employees of the Licensee. In conclusion, Mr. Clement submitted that the filing of the false figures was a mistake in judgement, which error had been immediately admitted, but that a reprimand would be sufficient in lieu of a suspension. He also submitted that in view of the fact that the Licensee achieved its proper ratio for the month of May 1984, the Decision of the Board imposing the "Term and Condition" should be revoked.

Mr. Grannum argued on behalf of the Board that in view of the fact that the filing of the false set of figures was deliberately done on behalf of the Licensee, the three-days' suspension of the licence as imposed by the Board was completely justified. He argued that there must be a deterrent to other Licensees not to falsify the reports being submitted to the Board.

Mr. Grannum argued with respect to the "Term and Condition" imposed that a 10:00 p.m. closing is the usual "Term and Condition" imposed by the Board in such circumstances, but that they were more lenient in this case because they took into consideration the reputation of Mr. Gray. In addition, the fact that the Licensee does have proper dining facilities and is operated as a legitimate dining lounge are matters in favour of the Licensee, but that they have already been taken into account. He pointed out that at the time of the hearing before the Liquor Licence Board the ratio had not been met and that it has only been met for the first time for the month of May, 1984. Mr. Grannum argued that the "Term and Condition" should be continued for at least two months to determine that the proper ratios would be maintained.

The Tribunal is of the opinion that the Decision of the Board with respect to the suspension should not be interfered with. The Licensee was involved in the deliberate filing of false figures and this is an extremely serious matter which cannot be condoned. The Tribunal is aware of the pressure on all Licensees to meet the requirements of the Act with respect to the food/liquor ratio, but this does not justify the deliberate breach of the Act which has been committed by the Licensee.

The Tribunal recognizes the fact that the Licensee has met the requirements of the Act with respect to the food/liquor ratio for the month of May, 1984. However, it is also aware that this is the first month since October of 1983 that the proper ratio has been met. The Tribunal is, therefore, of the opinion that the "Term and Condition" should not be imposed provided that the Licensee continues to meet a proper food/liquor ratio for two consecutive months after the date of release of this Decision.

Mr. Clement, in his argument, has pointed out the serious financial consequences resulting from the penalty imposed by the Board, but the Tribunal takes the position that all Licensees must be aware of any breach of any Regulation that may lead to a suspension or the imposition of a "Term and Condition". The Tribunal is, therefore, not prepared to take these factors into account in reaching its decision.

Accordingly, the Tribunal hereby confirms the Decision of the Liquor Licence Board to suspend the liquor licence of the Licensee for a period of three days and directs the Board to set the date of commencement of the said suspension. The Tribunal further directs that the Decision of the Board attaching a "Term and Condition" after completion of the aforesaid period of suspension be altered in that if the Licensee complies with the requirements of Section 9(6) of Regulation 581/80 of the Liquor Licence Act for the two calendar months following the date of release of this Decision, the "Term and Condition" be removed, but in the event that during the said two month period the requirements of Section 9(6) of the said Regulation are not met, the "Term and Condition" as set by the Board shall be imposed, and the Tribunal directs the Board to set the date of commencement of the said "Term and Condition".

481831 ONTARIO LIMITED
(LICENSEE OF CROSS ROADS TAVERN)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

REFUSING TO ISSUE A PATIO LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
KENNETH VAN HAMME, MEMBER

COUNSEL: JOHN J. CARDILL, representing the Appellant

S.A. GRANNUM, representing the Liquor Licence Board

PAUL WEBBER, representing the Township of Rideau
and the Township of Osgoode

DATE OF
HEARING: 10th January, 1984 Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Order of the Liquor Licence Board of Ontario dated the 26th day of September, 1983, whereby an application for a patio licence was refused.

The Licensee is the holder of a dining lounge and patio dining lounge licence No. 091573. The premises licensed as a dining lounge consist of five areas with a total capacity for 470 persons and the premises licensed as a patio dining lounge which adjoins the dining lounge premises on the main floor to the rear of the establishment has a capacity for 30 persons. It appears that prior to April of 1983, the Licensee made renovations to the premises and enclosed the patio area so that it became part of the dining lounge.

On or about the 21st day of May, 1982, the Licensee applied to the Liquor Licence Board for an additional patio dining lounge licence to be located at the front of the establishment, which additional premises would have a capacity for 125 persons. On the 4th day of July, 1983, the Liquor Licence Board issued a Notice of Proposal to refuse to issue the said patio licence because the issuance of the said licence is not in the public interest, having regard to the needs and wishes of the public in the municipality in which the premises are located and because the Licensee provided entertainment that disturbed persons on neighboring premises while the licence holder had been granted permission to sell and serve liquor outdoors. A hearing was requested by the Licensee and, as a result of that hearing, the Board issued its decision refusing the patio licence.

The premises of the Licensee are situate at the intersection of Regional Road No. 8 and Regional Road No. 19 and are actually located in the Township of Osgoode, although the property is virtually at the junction of four municipalities being the Township of Osgoode, the Township of Rideau, the City of Nepean and the City of Gloucester.

Counsel for the Board called as a witness Brian Markle, a Constable with the Manotick Detachment of the Ontario Provincial Police. Constable Markle gave evidence as to various problems which occurred on the weekend of June 4, 1983 when an outdoor function was held by the Licensee for which a "special occasions" permit had been obtained. He advised that there was a great deal of traffic and movement of people in general. He had been called because of a complaint with respect to noise at the outdoor function. It appears that a series of bands were performing from a raised area in the parking lot of the licensed premises. Constable Markle was also present at the function which continued for a second day on the 5th day of June, 1983, and he testified that according to the detachment records there were at least six complaints namely dealing with the problems of loud music. He indicated that there was probably a crowd of 1,000 people on June 5 and that there were certainly parking problems together with the security problem for the people handling the admission to the event. There had been outdoor concerts on previous occasions. Constable Markle testified that this type of entertainment draws a crowd from a large area including motorcycle clubs. Constable Markle had been stationed in the area since 1969 and knows the area well. He stated that it was generally a high-quality residential area.

On cross-examination by counsel for the Appellant, Constable Markle confirmed that there was another function on June 4 which was apparently held by the residents of Manotick and was called "Dickenson Day", and was held in the Village of Manotick in the area west of the Rideau River. This consisted of sidewalk sales and other activities and tents were set up for the sale of liquor after 6:00 p.m. This function also had entertainment including music with loudspeaker systems, but there was no elevated stage. Constable Markle also confirmed that there had been many previous street dances since 1956, but that the previous crowds were smaller and more local in nature. Constable Markle testified that he was aware of the patio licence adjacent to dining lounge number one and that there had never been any complaints with respect to the small patio on the south side of the building.

Mr. Webber, on behalf of the Township of Osgoode and the Township of Rideau, called evidence in opposition to the issuance of the patio licence. He produced a letter from the Clerk of the Corporation of the Township of Osgoode dated the 23rd day of December, 1983, which included a resolution of the Council of the Township of Osgoode objecting to the issuance of the patio licence and instructing the Township's solicitor to appear at this hearing. He also produced a certified copy of a resolution of the Municipal Council of the Township of Rideau passed on the 19th day of December, 1983, also objecting to the issuance of a lounge or patio licence for the premises of the Licensee. Mr. Webber then proceeded to call various witnesses who were residents in the immediate area. The first was Mr. Dick Flint who resides in Osgoode Township approximately 150 feet south of the Cross Roads Tavern. He had many complaints with respect to the activities of the street dance and festival held on June 4 and June 5 which related to the problems of loud music, debris on his lawn and disorderly conduct on the part of many people attending the function. Mr. Flint objected strongly to the issuance of the patio licence although much of his evidence related to the events which occurred on the dates of the "special occasions" permit.

On cross-examination, Mr. Flint confirmed that he has no objection to the operation of the patio at the rear but he worried about what might happen with a patio at the front of the premises which would have a capacity for 125 persons. He felt that the effect of the commercial expansion of the licensed premises was a concern with respect to the property value of his own property.

Mr. Webber called as a witness a resident of Osgoode Township, Michael Tyler who resided on Regional Road No. 19, approximately 100 feet south from the Cross Roads Tavern. He also objected strongly to the music and to the traffic problems which were created He stated that he was in opposition to the issuance of a patio licence. He was not against commercial activity, but when an outdoor activity infringed on his rights he was concerned. He was, therefore, opposed to the issuance of any type of an outdoor licence. On cross-examination, Mr. Tyler acknowledged that if there was no outside entertainment, his fears would be largely alleviated, but he still expressed his objection to the issuance of a patio licence.

Mr. Webber called as a witness George Peccinni who was a resident of Osgoode Township and lived about two miles south of the Cross Roads Tavern. His family has a fresh fruit and vegetable business at the crossroads and he expressed his concern about the problems which arose on the days of June 4 and June 5. They had a very serious problem with cars going to the festival parking in the parking lot of the fruit and vegetable business and, as a result, he had to close at 3:00 p.m. on the afternoon of June 4 and spent the rest of the afternoon guarding his premises. There were many trespassers and he was unable to leave his premises until after 2:00 a.m. On Sunday morning, he stated that there was an awful mess to be cleaned up in and around his area. Mr. Peccinni stated that he was opposed to the issuance of an outdoor patio licence. He felt that the owners of the licensed premises were not able to control their patrons and never had enough security.

On cross-examination, Mr. Peccinni confirmed that his main complaint centred around the activities on June 4 and June 5 which were the dates of the "special occasions" events. He confirmed that he had no complaint with respect to the operation of the previous patio.

The next witness was Jean MacDougall who lives in the City of Gloucester north of Regional Road No. 8 and west of Regional Road No. 19, and her property backs on the Rideau River. She is about five minutes' walking distance from the Cross Roads Taverns. Her main complaint was the noise from the premises. She had no problem with trespassers on her property, but the access road to her property showed evidence of campers having been there overnight. On cross-examination, she indicated her main concern was not completely the noise but that the activities in the area were getting worse each year. Each Saturday night there seemed to be far more people in the area. She stated that even if there was no entertainment or music on the proposed new patio, she felt that it would interfere with the enjoyment of her property by reason of the additional traffic. The type of customer at the Cross Roads Tavern also bothered her and she stated that when the customers at the Cross Roads Tavern were rural people from the area, things were far better. She acknowledged that she had never encountered any problem as a result of the operation of the former patio at the rear of the premises.

Douglas Humphreys, a resident of the Township of Rideau, was called by Mr. Webber. He had resided in Manotick for the past 38 years and he described to the Tribunal the community functions and community spirit which existed within the Village of Manotick. He stated that the operations carried on at the Cross Roads Tavern were totally foreign to the rural type of living which existed in Manotick. Mr. Humphreys stated that he was opposed to any type of outside operations at the Cross Roads Tavern. He stated that the licensed premises served a regional use and that the majority of the clientele were drawn from outside Manotick. He lives approximately three quarters of a kilometer from the Cross Roads Tavern across the Rideau River. He stated that noise travels very easily across the water and that he was appalled with the Sunday afternoon noise which was created on the afternoon of June 5. He complained to the Ontario Provincial Police in the afternoon and phoned again on the evening of June 5. He felt that the owners of the licensed premises had a complete disregard to the interests of the community. On cross-examination, Mr. Humphreys confirmed that beer was sold by the Kinsmen's Club at the Dickenson Day festival which was the other function carried on on June 4, but he felt that this did not have the adverse effect on the community which resulted from the operations of the Cross Roads Tavern. He felt that there was a complete disregard of the community interest by the owners of the Cross Roads Tavern. He stated that if a patio was constructed at the front of the premises with a seating capacity of 125 persons, this would attract a larger volume of traffic moving through the quiet rural Village and would affect the safety of the children at the community swimming pool and playground area. He again confirmed that he had never been bothered by any disturance from the previous patio.

The last witness called by Mr. Webber was Mr. Bruce Willems who resided on Riverside Drive in Manotick. His complaint centred mainly around the noise problems on the evening of June 4, 1983. He lived across the river from the Cross Roads Tavern and was not affected by any parking problems. On cross-examination, Mr. Willems indicated that his main complaint was with respect to noise and that his opposition to a patio licence was because of the lack of regard given by the Licensee to the community. He felt that he had a well-founded apprehension that if a patio licence was issued, there would be a lack of proper control.

Counsel for the Appellant called as his first witness Mr. Frank Bentivoglio, the owner of 481831 Ontario Limited, the Licensee of Cross Roads Tavern. Mr. Bentivoglio stated that he had operated the Cross Roads Tavern for a period of three years and that there were presently five licensed areas consisting of two restaurants, two bars and one banquet hall with a total capacity of 460 persons. He stated that the patio at the rear was enclosed as part of one of the dining areas in 1982. He stated that originally the special events program scheduled for June 4 and June 5 was to be a fund-raising event for the Ottawa-Carleton Lung Association, but that they withdrew their sponsorship about two weeks before the event. Mr. Bentivoglio stated that he was already fully committed to proceed with the event, having arranged band contracts and the cost to cancel would have been in excess of $10,000.00. He stated that he had arranged his own security with up to 20 people being on duty in the evening. The parking area was enclosed with a snow fence and limited to two entrances. Draft beer only was served in plastic containers. Mr. Bentivoglio confirmed that he had received numerous complaints with respect to the noise and had gone to the sound man in charge of the amplification systems ad requested that the volume be reduced.

Mr. Bentivoglio stated that he operated the original patio at the rear of the premises in 1981 and 1982 and that there was no music for entertainment of any kind. He stated that it was intended to use the new proposed patio at the front of the premises for lunches and dinners, including the sale of alcoholic beverages. There was to be no entertainment of any kind other than the possibility of piped in music. He confirmed that the application for the patio licence was based on a maximum capacity for 125 persons, but that he had contemplated purchasing furniture only to seat a maximum of 65 persons.

On cross-examination, Mr. Bentivoglio confirmed that included in the licensed premisese was the area known as "Lucifer's Lounge". He also confirmed that the entertainment consisted of a strip show featuring totally nude dancers. Mr. Bentivoglio also confirmed that he had an interest in two other strip shows and was the manager of the Lido in Hull. He did not agree with the evidence of the police officer as to the criminal element and the motorcycle gangs being attracted to the Cross Roads Tavern. He stated that customers were from all over the area and he confirmed that they were attracted to some extent by the nude dancers. He stated that his security people were only concerned with security within the Cross Roads Tavern and he did not contradict the evidence of the residents as to the conduct of the patrons in the surrounding area.

In argument, counsel for the municipalities submitted that the key matter before the Tribunal was whether Section 6(1)(g) of the Liquor Licence Act had been fulfilled. This reads as follows:

> 6(1) "An applicant for a licence...is entitled to be issued the licence...except where
>
> (g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located."

Mr. Webber submitted that the word "municipality" should not be restricted only to the residents of the Township of Osgoode, but that the word public as used in the section would include persons having a legitimate interest in the Village of Manotick and this would include the residents of Rideau Township, the City of Nepean and the City of Gloucester. He submitted that the evidence of the non-Osgoode people should have just as much weight as the residents of the Township of Osgoode.

Mr. Webber argued that the two Council resolutions showed the strong opposition from the Township of Osgoode and the Township of Rideau and their respective residents and indicated that the application for the licence is not in the public interest. He referred to the evidence of citizens of three municipalities together with the long list of objectors who had written letters to express their opposition to the application. Mr. Webber argued that the needs of the public did not include another liquor outlet with the additional traffic which would result. The fact that the Cross Roads Tavern would have a capacity for approximately 600 people indicated that the great majority of business came from outside the Manotick area.

Mr. Webber then referred to the wishes of the public. He acknowledged that the Cross Roads Tavern had an existing lawful right to do business, but that such business should be kept within the limits of the present establishment. He said that the residents of the area had great apprehension that if the patio licence application was allowed, the outside operation would not be properly controlled. By itself, it might not be important, but added to the total operation it would create additional problems.

Counsel for the Appellant argued that the question before the Tribunal was whether a patio licence should or should not be granted. He stated that the circumstances of the "special occasions" permit issued for June 4 and June 5 should be of no concern to the Tribunal. Most of the evidence dealt with the noise emanating from the special event that was carried on that day and that the existing permanent facilities were reasonably sophisticated and well run. He stated that the only evidence with respect to the operation of the previous patio at the rear of the premises was favourable. There had been no complaints. Mr. Cardill confirmed that the Appellant had no intention to apply for any "special occasions" permit in the future. He referred to the evidence of Mr. Tyler who said that he had no objection to a commercial establishment and no objection to a patio if there was no entertainment or piped in music. He stated that the Appellant would be prepared to see a restriction added to a patio licence prohibiting entertainment or piped in music requiring the premises to be monitored.

Upon a review of the total evidence, the Tribunal is of the opinion that the application for a patio licence must be refused. The main issue revolves around the needs and wishes of the public in the municipality in which the premises is located. The Tribunal is of the opinion that there is sufficient evidence in the form of the resolutions of the municipal Councils of the Township of Osgoode and the Township of Rideau, together with the direct opposition of those people who testified in these proceedings. This is supported by approximately 15 letters received by the Tribunal from residents of Manotick expressing their opposition to the application. It was argued that weight should only be given to those persons who resided in the Township of Osgoode in accordance with the strict interpretation of the Act. The Tribunal, however, takes the position that it must also relate to the needs and wishes of that part of the public who do not necessarily live within the strict boundaries of the Township of Osgoode, but who are involved on a daily basis with the activities in the local municipality, namely the Village of Manotick. This matter was dealt with by the Tribunal in its decision in the case of Leaside Restaurant, LLAT Volume 1, page 1, where it accepted as valid the clear needs of the public who work within the municipality as opposed to the needs and wishes of the immediate residents who were opposed to the issuance of the licence. The Tribunal is not bound by the needs and wishes of those persons only who actually reside in the municipality where the licensed premises is located, but is entitled to go beyond the political boundaries of the municipality in order to determine the needs and wishes of the public in the community.

The Tribunal hereby confirms the decision of the Liquor Licence Board dated the 26th day of September, 1983.

TOM JAKOBEK

APPEAL FROM THE DECISION OF
THE LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING LOUNGE LICENCE

RE: COLORBAR RESTAURANT INCORPORATED
(BABBAGE'S RESTAURANT)

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
KENNETH VAN HAMME, MEMBER

COUNSEL: RICHARD ARBLASTER, representing the Appellant

KAREN WRISTEN, representing Colorbar Restaurant Incorporated

S.A. GRANNUM, representing the Liquor Licence Board

DATES OF HEARING: 1st, 2nd, 9th May, 1984

REASONS FOR DECISION AND ORDER

This is an appeal by Tom Jakobek, the Senior Alderman for Ward 9 in the City of Toronto, from the Decision of the Liquor Licence Board dated the 16th day of December, 1983, to approve the issuance of a dining lounge licence to the applicant, Colorbar Restaurant Incorporated, for the premises known as "Babbage's Restaurant" situate at 2282 Queen Street East in the City of Toronto.

Colorbar Restaurant Incorporated submitted an application for a dining lounge licence for the premises on the 21st day of July, 1983 and, after a public meeting held on the 4th day of October, 1983, the Liquor Licence Board issued a proposal to refuse to issue a dining lounge licence for the said premises. On the 25th day of October, 1983, the applicant required the Liquor Licence Board to hold a public hearing pursuant to the provisions of Section 11(3) of the Liquor Licence Act and, as a result of such hearing, the Liquor Licence Board issued its Decision approving the issuance of the said dining lounge licence.

Mr. Jakobek filed this Appeal on behalf of himself and various residents of Ward 9. He has been the Senior Alderman in Ward 9 since he was first elected in 1982, but he has lived in this Ward for the last 24 years. Ward 9 includes an area referred to as "the Beaches" which is an area running from the intersection of Queen Street and Kingston Road easterly to the easterly limit of the City of Toronto at Victoria Park and runs northerly from the limit of Lake Ontario to Kingston Road. Babbage's Restaurant is situate on the north side of Queen Street near the eastern limit of the Beaches area.

Alderman Jakobek described the area of Queen Street extending easterly from Woodbine Avenue as firstly being a residential area, but then becoming a commercial strip near Woodbine Avenue with solid commercial as far east as Lee Avenue. A residential area commences at Hambly Avenue on the south side of Queen Street, but the north side is mainly service commercial. The area then is mixed residential and commercial, but east of Beech Avenue Mr. Jakobek stated that the properties were 70 per cent to 80 per cent residential interspersed with some service type commercial. He stated that the areas behind Queen Street, both north and south, are mainly single-family residential except for some fourplexes in the area south of Queen Street. Mr. Jakobek stated that there were presently 15 restaurants and dining lounges in the Beaches area of Queen Street with licences under the Liquor Licence Act. He stated that there had been eight applications since he first became an Alderman and that he had never previously objected. He stated that the prior applications were within the general commercial area and were no threat to the residential component. However, he stated that there was no buffer area between Babbage's and the residential areas adjoining and that the issuance of a liquor licence to the applicant would create serious problems for the residents in the area.

Councillor Jakobek filed as an exhibit a copy of a resolution of the Municipal Council of the City of Toronto passed in December of 1979, requesting the Liquor Licence Board of Ontario not to issue any new liquor licences in the area on Queen Street between Woodbine Avenue and Victoria Park Avenue, but this resolution was apparently not heeded by the Board as several licences had been issued to establishments in the area subsequent to that date.

Under the existing zoning by-laws of The Corporation of the City of Toronto in force at the time of the original application for a licence to the Liquor Licence Board, the subject property was zoned C1V1 which permitted eating establishments in the area and the necessary building permits for the construction of a restaurant were issued by the Building Department of the City of Toronto. At the request of Councillor Jakobek the Planning and Development Department of the City prepared a report to the Land Use Committee of City Council on the mechanisms to prohibit the increase of licensed establishments on Queen Street East between Woodbine Avenue and Neville Park Boulevard and this report was issued on January 6, 1984. As a result of the report, City Council passed By-law No. 132/84 on February 6, 1984 which was a holding by-law for a period of one year under the provisions of Section 37 of The Planning Act prohibiting the use of any building for the purposes of an eating establishment, place of amusement, club, tavern or public house. Subsequently by By-law No. 214/84 passed on the 2nd day of April, 1984, the original By-law No. 132/84 was amended by the addition of the words "licensed under the authority of the Liquor Licence Act, etc." immediately after the words "eating establishment". It appears that this holding by-law was directed at establishments seeking a dining lounge licence.

Mr. Jakobek then proceeded to comment upon the needs and wishes of the residents of the area. He stated that in his opinion the community within an area of two blocks of Babbage's is opposed to the application for the liquor licence and he referred to the petition of approximately 240 signatures of residents in the area of the restaurant, which petition was filed as an exhibit to these proceedings. Mr. Jakobek stated that throughout the balance of Ward 9 there was a significant number of people who did not live near the restaurant and were apathetic to the question. He stated that the municipality recognized the problem as shown by the fact that the Council of the municipality passed the two holding by-laws previously referred to. Mr. Jakobek stated that in his opinion he did not feel that there was a need for a dining lounge licence to be issued for the said restaurant.

On cross-examination, Mr. Jakobek stated that the population of Ward 9 is approximately 70,000. He stated that he helped to circulate the petitions and that his office had had them typed. He stated that he was aware of a petition of approximately 1,500 signatures in support of the application for the licence. He stated that he had reviewed this petition and that the majority of the persons in support lived more than one half of a mile from Babbage's. Mr. Jakobek stated that there were approximately 165 names on the petition in support of the application for the dining lounge licence showing addresses outside of the limits of the City of Toronto and that there were a number of people who lived within the limits of the City of Toronto but lived outside of Ward 9. Mr. Jakobek confirmed that he had written a letter to City Council requesting that they pass the holding by-laws previously referred to.

Counsel for the applicant reviewed with Mr. Jakobek the various commercial establishments in the area including the Bank of Montreal at Queen Street and Beech Avenue, the Fox Theatre to the east and two restaurants in the immediate area. He also confirmed that there was a Red & White store at the corner of Queen Street and Silver Birch Avenue, a BMW automobile dealership just east of Babbage's, together with various clothing stores, restaurants and other local service shops in the area.

Mr. Jakobek acknowledged that he was acquainted with the Chalet Restaurant, another licensed establishment to the west of Babbage's, and that he had known the owner since 1980. He stated that he had become friendly with the owner of the Chalet Restaurant. He confirmed that at the time the Chalet Restaurant had made application for a patio licence Mr. Jakobek had called a public meeting along with Alderman Dorothy Thomas and that after hearing the opposition of the residents, he indicated his opposition to the application for the patio licence by the Chalet Restaurant.

On cross-examination, Mr. Jakobek confirmed that he was aware of various problems with respect to the behaviour of some of the patrons of the Chalet Restaurant and he agreed that there was better management needed at the Chalet as well as at other licensed premises in the area, including Fitzgerald's Restaurant.

Mr. Jakobek, questioned in detail upon the contents of the report of the Planning and Development Department filed as Exhibit No. 15, stated that he disagreed with Sections 1A and 1B of the report. 1A stated that it is desirable to maintain the economic viability of the commercial strips without further City intervention. Section 1B of the report stated that the use of planning methods to differentiate between licensed and unlicensed establishments is unnecessary and becomes unclear and unjustifiable, particularly in terms of intensity of use and problems of traffic generation. The report went on to state that if traffic or parking is a problem in the area, then these concerns should be addressed, not licensed establishments. Mr. Jakobek confirmed that there had been no notice given to Colorbar of the proposed action of City Council with respect to the holding by-laws. He stated that the matter of the existing application was referred to in Council but not by name and that there had been no suggestion that Babbage's be excluded from the by-law because of the fact that the Liquor Licence Board had already granted a favourable decision.

The next witness called in opposition to the licence application was Don Kohara who resides at 26 Scarborough Road, seven houses north of Queen Street. He stated that he organized the petition consisting of 248 individual petitions of which 12 signed in favour of a holding by-law, but who were not opposed to the Babbage's application. He stated that there was a first petition prepared in late September consisting of approximately 200 names and that the second petition was prepared two weeks before the Liquor Licence Board Hearing. He stated that the area canvassed for the petition was an area within approximately two blocks of the restaurant, both north and south of Queen Street. A third petition was done during the few days before the commencement of this Appeal as evidence for the Appeal and was done on a door-to-door basis and was filed as Exhibit No. 19. He stated that the 240 signatures represented approximately 80 per cent of the canvassed area. Mr. Kohara stated that he was personally opposed to the application. He stated that there were enough problems with Fitzgerald's and that the licensed restaurant was of no benefit to him. He stated that he could not speak on behalf of the community in that regard. He felt that problems would only become worse with more intoxicated patrons and increased noise.

On cross-examination, Mr. Kohara stated that he had not examined the specific petitions and that there were probably duplications. His information was that there were 233 persons opposed to the Babbage's application for a dining lounge licence. He confirmed that he had told residents that Babbage's looked like a fine dining restaurant, but that if they cannot make a go of it in several months, what would happen to the premises? Mr. Kohara stated that he had never been in Babbage's, but that he had occasionally been in some of the other restaurants in the area. He also confirmed that his estimate of 80 per cent of the persons in the canvassed area having signed the petition was only an estimate on his part. He also confirmed that he had had discussions with some persons who had refused to sign the petition because Babbage's provided good food and these persons were not opposed to a dining lounge licence. He also acknowledged, on cross-examination, that there was a greater possibility of problems with the patrons of pubs as opposed to the patrons of a dining lounge.

Counsel for the Appellant proceeded to call eight other witnesses, all of whom were opposed to the application, and all of whom lived in the immediate area. Most of the objections of these residents centred around the problems with existing establishments such as Fitzgerald's and the Chalet Restaurant. They were also concerned with the potential increase in the parking problems and were concerned with the effect of an additional establishment in their area. Some witnesses felt that the commercial development in the Queen Street area should be limited to service commercial only such as cleaners, butcher shops and tea rooms.

Counsel for the Licensee called as her first witness Norman Bracegirdle who was one of the principals of Colorbar Restaurant Incorporated. He had had seven years' experience with a licensed dining lounge which was presently being operated by Colorbar in the West Hill area. He stated that his son, Stephen Bracegirdle, and his daughter-in-law, Barbara Bracegirdle, were the managers of Babbage's Restaurant. The witness produced a commercial uses map of the Beaches indicating all of the commercial establishments including the establishments with liquor licences in the whole of the Beaches area. He also filed as an exhibit a petition in support of the application for the dining lounge licence containing approximately 1,500 names which had been collected in an area extending from Kingston Road to Lake Ontario and between Munro Park on the east and Willow Avenue on the west. Mr. Bracegirdle filed as exhibits letters of clearance from all relevant municipal authorities with respect to the construction of the restaurant. He had had a meeting with Mr. Jakobek prior to the first Hearing before the Liquor Licence Board and he stated that as a result of this meeting he was under the impression that Mr. Jakobek was in support of the application for the licence. It was only after he received a telephone call from Mr. Jakobek two days later that he became aware that Mr. Jakobek would be opposing the application.

On cross-examination, Mr. Bracegirdle confirmed that their existing restaurant in the West Hill area was in a commercial plaza and he confirmed that his comparison of Babbage's with the existing restaurant was merely to establish his experience. He stated that there had never been any opposition to previous liquor licence applications and he had not anticipated opposition to this application after his meeting with Mr. Jakobek. He was aware as a result of information received from the liquor licence inspector in the area that there would be certain persons opposed to the application, but he assumed that because of his past experience it would be sufficient to justify the licence. Mr. Bracegirdle was cross-examined on the large area from which the petition was gathered and was challenged on how people near Kingston Road would be affected by Babbage's. He stated that there was no noise from the operation of a fine dining room and that it was substantially different from a pub. There was substantial cross-examination with respect to the names and the addresses of the witnesses and it was confirmed that there were certain persons who signed the petition who lived in Scarborough and also persons who had signed for other members of their family. He confirmed that the architect had originally included a patio in the plans that had been prepared for Babbage's, but that a patio was not appropriate for this location and had been included by the architect on his own.

The next witness called on behalf of the Appellant was John Maxwell who was a restaurateur with 19 years of experience and was examined as an expert witness. He filed as an exhibit a floor plan of the premises showing the layout, the traffic flow for both staff and patrons, and confirmed that the plan indicated that the primary function of the restaurant was a dining room with a bar to be used only as a waiting area. The bar near the front door can be fully regulated by the maitre d'. Mr. Maxwell was then questioned on whether a restaurant of the type of Babbage's could succeed without a liquor licence and, in his opinion, such an operation would not be financially viable. He was of the opinion that the Bracegirdles were highly qualified restaurateurs and that they would run an excellent operation.

Counsel for the applicant proceeded to call as a witness Barry Kohl, the head chef at Babbage's who had had substantial experience at other well-known restaurants in the Toronto area, and discussed the policies for the operation of Babbage's as a fine dining restaurant. He stated that none of the food is pre-prepared and that the objective of the owners is to create a top quality dining room with continental cuisine. He stated that in this type of restaurant wine played a very important part.

The next witness called by Counsel for the applicant was Alderman Dorothy Thomas, the other Alderman in Ward 9, who provided a history of the licensed establishments in the area. She stated that she was in support of the application for a dining lounge licence by Babbage's. She stated that it was necessary to maintain the economic viability of the Beaches area and gave evidence as to what had happened at City Council up to and including the passing of the two by-laws in 1984.

She stated that the amending By-law No. 132/84 was not certified by the City Solicitor because he was of the opinion that the by-law was not within the authority of the Council of the City of Toronto. She stated that the by-law had not gone to the Ontario Municipal Board. She further stated that no planning evidence had been submitted to Council to justify the passing of the by-law and that she had voted against the amending by-law. She stated that, in her opinion, the amending by-law was discriminatory in that it had been used to attempt to stop the application of Babbage's.

Much of the cross-examination of Alderman Thomas dealt with what had occurred with respect to the original by-law and amending by-law up to the time of the passing of the two by-laws. The witness stated that she had concerns about some licensed premises, but did not have the same concerns with respect to Babbage's. She had been made aware that many people in the area had indicated support of the application for the dining lounge licence. Alderman Thomas acknowledged that she had voted in favour of the original By-law No. 132/84 when it came before City Council in February of 1984, but that she opposed the amending By-law No. 214/84. She stated that she had a discussion with Alderman Jakobek relating to the proposed amending by-law and that he had indicated to her that the purpose of the amending by-law was to stop one liquor licence application. She stated that the inference was that it was the Babbage's application. Alderman Thomas stated that all of the Queen Street Beaches area is a low intensity commercial area and that in her opinion the area east of Willow Avenue is not more residentially inclined than the area to the west.

The next witness called on behalf of the Licensee was Kelly O'Brien who resides on Willow Avenue two houses north of Queen Street. He stated that he used the Queen Street strip for shopping and had eaten at many of the restaurants in that area. He had been to Babbage's for dinner on five occasions and found the restaurant to be quiet and friendly with excellent food. He stated, however, that he was unable to use Babbage's for entertainment in his business because he was embarrassed by the lack of a liquor licence. He stated that he was fully in support of the application for the dining lounge licence and would use the premises for business purposes if it did have a dining lounge licence.

The next witness called was Stephen Bracegirdle who was a principal of Colorbar Restaurant Incorporated and had been the manager of the West Hill restaurant. He outlined the background in selecting Babbage's as a site for a restaurant in the Beaches area. He stated that he had done a market survey prior to completing the purchase of the property and felt that there was no hard-core resistance to his plans. He heard complaints about the way other restaurants were run, but he only felt encouraged to construct and operate a fine dining lounge which would not include a pub element. He stated that after the October 4, 1983 meeting before the Liquor Licence Board he got a number of ideas as to how to improve the premises, including the construction of an extra exhaust system, moving the delivery from the back to the front of the premises, relocating the garbage pickup to Queen Street, refacing the east wall of the building and removing the windows from the back of the building. He stated that business was very poor due to the lack of a licence and that over 50 per cent of potential customers would leave when they would find that there was no liquor licence.

Counsel for the Licensee proceeded to call four additional witnesses who were residents in the area, including Louis Mikolainis, who was a chef in various hotels and clubs; Mo Wallace, a retired lawyer who lives approximately one block north of Queen Street; Mrs. Pat Dingle, who with her late husband had lived in the area for nine years; and Jim Chiles, who lives south of Queen Street, and all of them supported the application, giving evidence as to the quality of the food and service and, in their opinion, the need for a restaurant of this type in the Beaches area. Counsel for the Licensee also filed a series of citizens' letters together with a further petition in support of the application.

There are two issues to be dealt with by the Tribunal in this Appeal. The first is the question of the effect of the two by-laws passed by the Council of The Corporation of the City of Toronto, the first being By-law No. 132/84 passed on February 6, 1984 prohibiting the use of any building or structure for.....an eating establishment, and the second being amending By-law No. 214/84 passed on April 2, 1984 adding after the words "eating establishment" the phrase "licensed under the authority of the Liquor Licence Act, etc." It was argued by Counsel for the Appellant that the passing of the by-law by City Council was very significant in that it was a holding by-law for a period of one year to permit a study to be undertaken and was an interim control by-law. Counsel argued that unlike zoning by-laws this by-law came into force immediately without the Ontario Municipal Board's approval. He stated that the importance of the by-law is not a question of legality but rather is the fact that Council is in opposition to the granting of any additional licences.

Counsel for the Licensee argued that it was not proper for the Tribunal to take cognizance of the by-law and that the Tribunal had no authority to deal with the question of the legality of the by-law. She argued that under Section 4 of the Liquor Licence Act, only the Liquor Licence Board had the exclusive jurisdiction to issue a liquor licence and that the City of Toronto, by passing By-law No. 214/84, was attempting to be a licensing authority. The City of Toronto is a creature of Statute and only has those powers specifically delegated to it. This does not include the power to license dining lounges under the Liquor Licence Act. She argued that the Tribunal had no authority to deal with the legality of By-law No. 214/84 and that this question would be dealt with in another court of competent jurisdiction.

The Tribunal is of the opinion that in arriving at its Decision it should not take cognizance of By-laws Nos. 132/84 and 214/84. We would point out that these by-laws were both passed subsequent to the Decision of the Liquor Licence Board on December 16, 1983, granting the licence. This Appeal is taken from that Decision and even if it is found that By-laws Nos. 132/84 and 214/84 are valid, the Tribunal is of the opinion that they cannot be retroactive. The Appellant denied that these by-laws were specifically aimed at blocking the Babbage's application and, assuming that it was not discriminatory action taken with the main purpose of thwarting the application of the Licensee, this is all the more reason why the by-laws should not be considered by the Tribunal in arriving at its Decision.

The question before the Tribunal, therefore, resolves down to the question of whether the issuance of the licence is in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located in accordance with the provisions of Section 6(1)(g) of the Liquor Licence Act. Section 6(1) states that an applicant for a licence is entitled to be issued the licence "except where" any one of the seven Subsections ((a) to (g) inclusive) have not been complied with. It is not argued that the applicant does not comply with any of the requirements of Subsections (a) to (f) inclusive, and the Appeal resolves itself to the "needs and wishes" question. Substantial evidence was called on behalf of both the Appellant and the Respondent. The Appellant called nine residents in opposition to the application and the Respondent called seven residents. The Appellant presented a petition of 223 residents opposed to the application, which petition was canvassed within a few blocks of the licensed premises, while the Respondent filed petitions with over 1,400 names coming from a far wider area including some persons who did not reside within the municipality. Alderman Jakobek was the Appellant in these proceedings and was opposed to the application for the licence while Alderman Thomas supported the application. The evidence in support of the application and opposed to the application is very balanced, but the onus is on the Appellant to establish that the issuance of the licence is not in the public interest and the Tribunal finds that upon the evidence the Appellant has not discharged this onus. There was no evidence of any ratepayers groups being opposed to the application. There was no direct action taken by City Council in passing any resolution opposing the issuance of the licence to the applicant. The restaurant has been in operation for a period of approximately four months and there was no evidence of there being any increased nuisance to the residents of the area as a result of that operation. The evidence also established that this area of Queen Street, all of which is zoned C1V1, is a mixture of commercial and residential use and the establishment of the restaurant has not changed that use. There was nothing to contradict the evidence given on behalf of the Licensee that the restaurant would be a high quality dining lounge which was developed in accordance with all municipal by-laws in effect at the time.

The Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 16th day of December, 1983.

KAAN INVESTMENTS LTD.
(LICENSEE OF SIT-N-BULL PUB RESTAURANT)

APPEAL FROM THE DECISION AND ORDER OF THE LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
DENNIS EGAN, MEMBER

COUNSEL: DESMOND NOBLETT, Agent for the Appellant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 12th September, 1984

REASONS FOR DECISION AND ORDER

This is an Appeal from the Decision of the Liquor Licence Board of Ontario dated the 10th day of April, 1984 whereby the Board attached a "TERM AND CONDITION" to the licence of the Appellant for the premises known as "Sit-N-Bull Pub Restaurant" situate at 6 Mill Street East, in the Town of Halton Hills, whereby the sale and service of alcoholic beverages in the dining lounge of the said establishment shall cease at 10:00 p.m. daily.

There appears to be no dispute with respect to the facts of this Appeal. Counsel for the Board filed as an exhibit a statement showing the food/liquor sales ratio for the period from February of 1983 to July of 1984, and it is acknowledged that during the period from March of 1983 until the present time the Appellant has not complied with Section 9 of Regulation 581/80 of the Liquor Licence Act as amended, and the food sales during this period have comprised from 19 per cent to 33 per cent of the total sales. This compares unfavourably with the minimum food sale requirement of 40 per cent of total sales as set out in the regulations. Counsel for the Board called as his first witness Charles B. Rycroft, an investigator with the Liquor Licence Board, who monitored the sales of the premises on two days in July of 1983 and found on those days food sales of 24.92 per cent and 19.61 per cent, respectively, with liquor sales being 75.08 per cent and 80.39 per cent on those days. The witness testified that, in his opinion, the reason for the ratio problems related directly to the entertainment provided after meal hours which increased a substantial amount of additional business, but very little in the way of food sales. The witness, on cross-examination, acknowledged that the appearance of the front of the building was not attractive and would affect his attitude in taking his own family to dine in the restaurant.

A second witness called on behalf of the Board was Ivan Robinson, an inspector with the Board for the Region of Halton, and he testified that he had made five or six inspections from the period from October in 1983 to August of 1984. He testified that during the lunch hour there is a full kitchen with a portable buffet, but that the premises were not busy on any of his day visits. He had been to the premises on occasion after 9:00 p.m. and found that the patrons were a younger group and that some of the patrons were eating while some were only drinking. He stated that alterations were presently under way in the premises and that at the present time it was not too attractive. He confirmed that, in his opinion, the Licensee was making a real effort to increase food sales and the inspector knew of no other problems with respect to the operation of the premises. He stated that he knew of no problems with rowdiness among the patrons. He stated that the other licensed premises in the area had both dining lounge and lounge licences and that none of the other premises provided entertainment.

Ronald Norman Noblett, the President of the Licensee corporation, testified on behalf of the Appellant and stated that the main problem in attracting more dining patrons was the appearance of the front of the building. He stated that there had been a considerable investment with respect to interior renovations in excess of $30,000.00 and that exterior alterations are now under way. He advised that he purchased the business in February of 1983. His staff consists of three full-time cooks, all of whom are experienced and work 40 hour weekly shifts. He also employs four full-time waitresses during the day and three waitresses in the evening. He filed as an exhibit plans for the renovations to the exterior of the premises which included a new front together with several interior renovations including washrooms and a new smorgasbord table. He acknowledged a problem with food sales at night and testified that special promotions to sports teams were being made in order to attempt to increase the food sales during this period of the business day. He confirmed that there had been no remuneration paid to the partners to date and that there had been a $42,000.00 loss to February 29, 1984. He stated that when he took over the business in February of 1983, the previous books indicated compliance with the food/liquor ratio as required by the Liquor Licence Act, but that this was apparently false. He also testified that the food/liquor ratio for August of 1984 showed some additional improvement with food sales representing 34.4 per cent of the total sales. He also confirmed that he had eliminated entertainment for the period from Sunday to Wednesday, inclusive.

In argument, Counsel for the Board confirmed that the physical facilities and service for the premises were adequate, but that the whole issue was the question of compliance with the food/liquor ratio and that the Licensee is unable to meet this ratio. He stated that the proposal was issued in September of 1983 by the Liquor Licence Board and the hearing date was delayed for several months until April of 1984 in order to give the Appellant a reasonable opportunity to meet the ratio, but that he had failed to achieve this. The main problem appears to be the entertainment which increases substantially the liquor business during the evening and throws the entire ratio out of balance. He argued that there was a responsibility on the Licensee to change his method of operation in order to comply with the Act and regulations.

The Appellant, in argument, submitted that a substantial investment had been made in this business and he knows that money can be made in the food business, but that the appearance of the building is a big deterrent. He stated that the business cannot survive at this time without entertainment, that things are going in the right direction, but that he needs the support of the Liquor Licence Board.

The Tribunal is of the opinion that the Licensee is making a valid attempt to meet the proper food/liquor ratios, including the investment made in improving the exterior appearance of the building and the interior renovations. However, there is the uncontradicted evidence that the Licensee is not complying with Section 9 of Regulation 581/80 of the Act as amended and the food sales for August, which was the highest percentage in 17 months was still only 34.4 per cent. This fact cannot be ignored.

The Tribunal, therefore, directs that the Decision of the Liquor Licence Board attaching a "TERM AND CONDITION" be altered to read as follows:

> "It will be a "TERM AND CONDITION" of the licence granted to Kaan Investments Ltd. in respect of the Sit-N-Bull Pub Restaurant that the sale and service of alcoholic beverages shall cease at 11:30 p.m. daily in the dining lounge of the establishment",

and the Tribunal directs the Board to set the effective date of the commencement of the attachment of the said "TERM AND CONDITION".

FEDERICO MARRELLI and YOLANDE MARRELLI
(LICENSEES OF COUNTRY PLACE TAVERN)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE DINING LOUNGE LICENCE
ISSUED TO DINING LOUNGE #2

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
ROBERT COWAN, MEMBER

COUNSEL: GERALD E. NORI, Q.C., representing the Appellant

S.A. GRANNUM, representing the Respondent

DATE OF
HEARING: 13th June, 1984 Sault Ste. Marie

REASONS FOR RULING

This is an appeal from the Decision of the Liquor Licence Board to suspend the dining lounge licence issued to Dining Lounge No. 2 of the Licensee for the licensed premises herein.

Upon the commencement of the hearing, counsel for the Appellant submitted a preliminary objection that the original hearing before the Liquor Licence Board of Ontario was invalid and that the Decision of the Board as rendered was ultra vires of the Liquor Licence Act of Ontario which requires the Chairman to refer an application for a hearing to two or more members of the Board designated by the Chairman. It is now acknowledged that the hearing held by the Liquor Licence Board was held only by one member, Mrs. M.N. Saunderson. Counsel cited several cases to support his position that in the absence of an expressed power of delegation the lack of a statutorily prescribed quorum will result in an invalid Decision.

The Tribunal, having considered the preliminary objection, finds that the provisions of Section 12, subsection 1 of the Liquor Licence Act have not been complied with in that the hearing was referred only to one member of the Board and the Chairman of the Liquor Licence Board was not present at the hearing. The Tribunal accepts the argument that based upon the decision of the British Columbia Supreme Court in the case of

Re: Canadian Pacific Transport Co. and Loomis Courier Services (1976), 72 D.L.R. (3d) p.434 and the Decision of the Manitoba Court of Appeal in the case of Re: Inter-City Freight Lines Limited vs. Swan River (1972), 2 W.W.R. p.317, the proceedings before the Liquor Licence Board and the Decision rendered by the Board were a nullity. It was argued that the Tribunal is sitting by way of trial de novo only if there is a valid Decision in the first place. Similarly, the Tribunal does not have the authority to refer the matter back to the Board under Section 14(3) of the Act if the first proceedings were a nullity.

The Tribunal therefor finds that Section 12(1) not having been complied with, the Decision of the Liquor Licence Board is a nullity and the Tribunal is not empowered to hold a hearing into this matter.

MASTERS BUFFETERIA INC.
(LICENSEE OF SAVANNAH HOTEL)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A PATIO DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
F. THOMAS PEOTTO, MEMBER

COUNSEL: MYLES F. McLELLAN, representing the Appellant

S.A. GRANNUM, representing the Respondent

JAMES H. MATHIESON, representing Fred V. McCann

NANCY J. TORAN-HARBIN, a party

DATE OF
HEARING: 15th February, 1984 Barrie

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 23rd day of August, 1983, whereby an application for a patio dining lounge licence in respect of the premises known as the "Savannah Hotel" situate in the Township of Innisfil at Stroud, Ontario, was refused.

The Licensee is the holder of a dining lounge licence No. 011393 which was originally issued on the 24th day of December, 1980. The premises licensed as a dining lounge consist of one area with a capacity of 141 persons.

On or about the 25th day of January, 1983, the Licensee applied to the Liquor Licence Board for a patio licence for the said premises. On the 12th day of May, 1983, the Liquor Licence Board issued a Notice of Proposal to refuse to issue the said patio Licence because the issuance of the said licence is not in the public interest, having regard to the needs and wishes of the residents of the municipality in which the premises is located. A hearing was requested by the Licensee before the Liquor Licence Board and, as a result of that hearing, the Board issued its Decision refusing the patio licence.

The application for the patio licence was opposed by Fred V. McCann and other area residents. Mr. McCann was called as a witness and he stated that he lived approximately 50 feet from the Savannah Hotel. He stated that there had been frequent problems and that his main objection had been the problems of noise, parking and the lack of consideration given by the patrons of the hotel to the residents of the area. Mr. McCann stated that there were frequent problems which resulted in calls to both the police and the proprietor of the hotel. He stated that on one occasion in the summer of 1983, he had called to complain of noise after 11:00 p.m. and received a lot of abuse from the proprietor, Peter Vatikiotis. The witness stated that there is no patio in existence at this time, but that on a half dozen occasions he had seen patrons sitting out in front of the hotel at picnic tables drinking beer. The witness felt that his property had been devalued because of the existing nuisance. On occasion, his driveway had been blocked. He stated that the Savannah Hotel is the only commercial enterprise in Cedar Harbour which is mainly a summer resort area. Mr. McCann stated that the zoning for the whole area, including the area on which the hotel is situate, is residential. He stated that a by-law has been proposed classifying the hotel as commercial, but that no application has yet been made to the Ontario Municipal Board. Mr. McCann gave evidence as to other licensed establishments in the area and stated that most of the patrons of the Savannah Hotel did not live in the Cedar Harbour area and drove to the hotel. Mr McCann stated that the quality of life in the primarily vacation area of Cedar Harbour would be adversely affected by the issuance of a patio licence. He was concerned about the increase in noise pollution and that the issuance of a licence would be a retrograde step and would serve no useful purpose.

On cross-examination, Mr. McCann acknowledged that he had known the proprietor of the Licensee for approximately four years, but was unable to judge his business ability. He did not know how many calls he had made to the police and he stated that he had never called a liquor licence inspector. Mr. McCann stated that he had never lodged any formal complaints with respect to drinking outside the premises. He also acknowledged that his realty taxes had been reduced on appeal because of the proximity of his property to the Savannah Hotel. Mr. McCann also acknowledged that Innisfil Park, which is a large municipal park, is north of the hotel and is along the northerly limit of Cedar Harbour. This is an 80 acre park which is very heavily used. Mr. McCann stated that he objected more to the drinking crowd as opposed to the dinner crowd, but that he would be opposed to the use of the patio for diners only. Mr. McCann stated that there would be between 200 and 300 residences in the area, but that the great majority were summer residences only.

The next witness called was Nancy J. Toran-Harbin who is a solicitor practising law in Scarborough, but who resides with her husband in the property immediately adjoining Mr. McCann's property. Mrs. Toran-Harbin stated in cross-examination that this property was their principal residence. The witness in opposing the application stated that the granting of a patio licence would exasperate an existing problem. The patio would be located on the lake side of the hotel. The witness stated that she had had previous experience with a patio restaurant and that noise over the water would be amplified greatly. She stated that the present noise is quite significant. She also stated that she had seen beer consumed outside of the hotel on occasion late in the evening. She stated that the hotel was a "watering hole" located in the middle of a residential area and that she also had had problems with patrons of the hotel parking in her driveway and had received verbal abuse when she asked them to move. The witness stated that the hotel provides entertainment in the summer. She lives in a fully-detached brick home, but the noise of the music is so loud that she can feel the amplification inside her home. She stated that immediately beside the hotel is an open space which appears to be an unopened road allowance and a continuation of Eastern Avenue which has been used as an open space area and as access to the lake.

On cross-examination, the witness acknowledged that her property was approximately 150 feet from the lot on which the Savannah Hotel was actually located. She stated that she had not made any complaints to the liquor inspector, but that Mr. McCann had called the police on her behalf when she was away. She stated that the Licensee had made an application to rezone two lots being Lots 142 and 143 immediately across from the hotel in order to create a parking lot, but that objections had been filed to the application for rezoning and the change in the official plan.

The next witness called was Mary Schurr who resides on Lot 23 across the unopened portion of Eastern Avenue from the Savannah Hotel. She referred to the unopened road allowance as an open space area and stated that it was used for parking by the patrons during the summertime. Mrs. Schurr's property would be immediately across from the area on which the patio would be constructed. Mrs. Schurr stated that in the summertime the hotel becomes quite noisy at 9:00 o'clock in the evening and that she has had numbers of people in her driveway and that the driveway has been often blocked. She has phoned the police on many occasions. She is concerned that the issuance of a patio licence would create far more noise. She stated that some of the residents including young people and children in the area used the open space as access to the lake and that the existence of a licensed patio immediately adjoining this open space area used by young people would not be appropriate.

On cross-examination, Mrs. Schurr stated that she bought her property approximately ten years ago and that the hotel was in existence at that time. She stated that the open space area had previously been maintained by the neighbors in the area who cut the grass. She also acknowledged that she did not hear the patrons of the hotel since air conditioning had been installed in the hotel. She stated that the entertainment provided by the hotel consisted of an organ player with drum attachments.

Counsel for the objectors called seven additional witnesses who were residents of the area, all of whom objected to the issuance of the patio licence. Their main objection was the additional noise which would be created by the users of the patio, together with the existing parking problems and the apparent lack of control of the patrons by the management of the Savannah Hotel. Several witnesses confirmed that people were seen sitting at a picnic table on various occasions drinking beer and they all felt that the increased noise from the issuance of a patio licence would impair the use of their property. Most of the witnesses also confirmed that the unopened road allowance immediately adjoining the Savannah Hotel property had been used and developed by the residents as a swimming area, that the grass had been cut by the local residents and that cement steps had been constructed for the benefit of the residents. They stated that the construction of a patio immediately adjacent to this area would compound the problem. Several witnesses referred to the abusive language and the loud noise level which affected the use of the open space area. All of the witnesses referred to the substantial increase in traffic since the Savannah Hotel received its dining lounge licence.

Counsel for the Appellant called as his first witness Peter Vatikiotis, the proprietor of the Savannah Hotel, who stated that he had been in the restaurant business for over 25 years and had operated the Savannah Hotel for five years. He stated that the dining lounge liquor licence was issued on December 24, 1980, and that he had never had any complaints from either the liquor licence inspectors or the Liquor Licence Board, itself. The police had attended on a couple of occasions, once with respect to a dispute over a room. Mr. Vatikiotis felt that he had a good relationship with the Police Department. He stated that the dining room lounge was located on the ground floor and that there were 12 rooms for rent on the second floor together with one meeting room, also on the second floor. When questioned about drinking outside of the hotel, Mr. Vatikiotis stated that to his knowledge hotel guests never did drink outside, but that there was nothing to stop the upstairs room guests from taking their own beer outside. He stated that there was presently parking for 30 cars and that he hoped to have a new parking lot constructed on Lots 142 and 143 across from the Savannah Hotel which would permit parking for 36 additional cars. He advised that the Township of Innisfil had passed the by-law but later, on cross-examination, he acknowledged that there was a public meeting which had been called by the Township of Innisfil re the proposed use of the parking lot and the proposed change of zoning and amendment to the official plan. He advised that the present entertainment was an organ player and singer who had been playing for the Savannah Hotel for the past four years. He stated that his current hours of operation were from 11:00 a.m. to 1:00 a.m. Monday to Saturday, and from 12:00 noon to 10:00 p.m. on Sunday. He stated that approximately 50 per cent of his patrons were from Sandy Cove which was two to three miles away and that the rest came from various parts of the Township.

On cross-examination, Mr. Vatikiotis advised that there was not much demand for his rooms and that he had an occupancy rate of approximately 20 per cent. He confirmed that he had permission from the Township of Innisfil to use the unopened portion of Eastern Avenue running to the lake for parking purposes. He also stated that the Savannah Hotel building was presently 12 feet from the lot line and that the patio would extend in two sections from the rear of the hotel to a point approximately eight feet from the water's edge. Mr. Vatikiotis was questioned by Counsel for the Liquor Licence Board with respect to the petition which was filed as an exhibit containing 400 names and he advised that the petition had been located by the cash register in the hotel and that the signatures of the patrons were requested. He had no knowledge as to the residences of the people who signed the petition. He also stated that he had no complaints from the residents with respect to noise, but did acknowledge that he had received one call.

Counsel for the Appellant called as his next witness Laurie Franks who was a resident of Alcona and a past member of the Innisfil Township Council during the years 1981 and 1982. She stated that she had been involved in the planning process for the official plan of the Township of Innisfil. She stated that the area known as Cedar Harbour is part of the Alcona area and was shown to be a growth centre on the official plan. She stated that the Alcona population is approximately 4,500 increasing to 6,000 in the summertime and that the population of Sandy Cove Acres was approximately 2,000 persons. She stated that she was the Vice-President of the Alcona Business Association and was present on their behalf in support of the application for the patio licence.

On cross-examination, Mrs. Franks confirmed that the official plan for the Township of Innisfil had been approved by the Minister of Housing, but that the zoning by-law to implement the official plan had not yet been approved. She confirmed that she was not a member of the Bell Cedar Ratepayers Association, but was speaking on behalf of the Alcona Business Association.

Counsel for the Appellant read in as evidence the letter of support from the Bell Cedar Ratepayers Association which was introduced as Exhibit No. 10 and also advised that he was relying on the Secretary's Minutes of the proceedings before the Liquor Licence Board including the copy of the Petition containing between 300 and 400 signatures in support of the application.

Mr. Fred McCann was recalled in reply and advised that he had examined all of the signatures on the Petition filed in support of the applicaton for the licence. He stated that only one person was a resident of Cedar Harbour, but that a fair percentage of the signatures were residents of what was referred to as the Alcona Grove area.

In argument, counsel for the objectors, Fred V. McCann and the residents of Cedar Harbour, stated that under the provisions of Section 6(1)(g) of the Liquor Licence Act the onus is on the objectors to a licence to show that the issuance of the licence is not in the public interest, having regard to the needs and wishes of the residents of the municipality in which the premises is located. He stated that the onus is to be based on the balance of probabilities and that the concerns of the objectors must be bona fide. He also stated that regard must be given to both the needs and the wishes, and that they must not represent one particular group. He stated that the needs and wishes of those closest must be given the most weight. He stated that the word "needs" should be defined as the need of the property owner to use his property with quiet enjoyment. He stated that concerns with respect to traffic, parking and zoning were matters of concern which were valid concerns of the needs and wishes. He stressed that the quality of life issue is the most important issue and that the granting of a patio licence would be a step towards the destruction of that quality of life.

Counsel for the Liquor Licence Board argued that the greater weight should be given to the evidence of the persons who appeared at the hearing as they were the persons most directly affected. They were able to speak directly on the change in the quality of life. He stated that it was significant that only one person who signed the petition was a resident of Cedar Harbour.

Counsel for the Appellant stated that there was no evidence before the Tribunal that the people who signed the Petition did not represent Cedar Harbour. He referred to the Decision of the Liquor Licence Appeal Tribunal in the case of Leaside Restaurant, Volume 1, page 1, and sumitted that a proper definition of "the public" is not the entire municipality, but is the general serving area and suggested that this would be within a radius of five miles of the Savannah Hotel. He referred to the evidence in support of the application for the licence as being the signed Petition of approximately 400 residents of the communities in the area, the letter from the Bell Cedar Ratepayers Association and the endorsement of the Alcona Business Association by the attendance of an executive member of that association. He suggested that in interpreting Section 6(1)(g) of the Act, the needs and wishes can be satisfied by determining limited times of operations for the patio. He acknowledged that parking is a problem, but that the Appellant is taking all steps within his power to alleviate the parking problem. He pointed out that the objectors to the patio licence were also objecting to the zoning amendment to create the new parking lot and that the granting of a patio licence would result in a better facility.

Upon a review of the evidence, the Tribunal is of the opinion that the application for the patio licence must be refused. The Tribunal has heard the direct evidence of ten residents of the immediate area, all of whom objected to the issuance of the licence, and all of whom indicated that the quality of life for them would be adversely affected by the issuance of the said licence. The licencing of an outside patio in the middle of a residential area would create additional noise and would create additional incidents of nuisance to the residents. The Tribunal heard a lot of evidence with respect to the use of the road allowance by the residents for beach purposes and this would be severely restricted by the construction of a licensed patio only 12 feet from the property line and eight feet from the water's edge. The Tribunal agrees that the onus under Section 6(1)(g) of the Liquor Licence Act is on the objectors to show that the issuance of the licence is not in the public interest, having regard to the needs and wishes of the public, but the Tribunal is of the opinion that this onus has been satisfied. The only evidence called on behalf of the Appellant was the evidence of the representative of the Alcona Business Association and the indirect evidence of the petition of 400 signatures, virtually all of whom came from outside of the Cedar Harbour area. No member of the executive of the Bell Cedar Ratepayers Association was called to give evidence and there was no other direct evidence of citizens in the area supporting the application for the licence.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 23rd day of August, 1983.

THE NEWFOUNDLAND CULTURAL SOCIETY OF CANADA INC.

APPEAL FROM THE DECISION OF THE LIQUOR LICENCE BOARD OF ONTARIO TO REFUSE TO ISSUE SPECIAL OCCASION PERMITS.

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
DENNIS EGAN, MEMBER

PATRICK T. POWER, its Agent

COUNSEL: S.A. GRANNUM, representing the Liquor Licence Board of Ontario

DATE OF HEARING: 12th September, 1984

REASONS FOR DECISION AND ORDER

This is an Appeal from the Decision of the Liquor Licence Board of Ontario dated the 12th day of July, 1984, whereby the Board refused to issue Special Occasion Permits to the Appellant on the grounds that the Appellant did not comply with the provisions of Section 39(2) of Regulation 581/80 under the Liquor Licence Act.

The Board, in its Decision, stated that the Appellant must either apply for Supplementary Letters Patent broadening its objects to conform to Section 39(2) of the Regulation or the Society must obtain registration under the Income Tax Act. Counsel for the Board acknowledged that the Letters Patent of the Appellant were sufficiently broad to comply with the requirements of Section 39(2) and that the question to be determined on the Appeal was whether the Appellant was organized for the advancement of charitable, educational, religious or community objects.

Counsel for the Board called as its only witness Lorna J. Rankin, the manager of the Special Occasions Approval Division of the Liquor Licence Board, whose duties were to ensure that permits are properly issued. She stated that in order to qualify for a Fund Raising Permit, an organization must prove to be charitable in nature either with an income tax number or its charter must indicate that it was incorporated for charitable objects. Each application is reviewed on its own merits. Four Fund Raising Permits had been issued to the Appellant on May 13, 1984, May 27, 1984, June 17, 1984 and June 23, 1984. The witness stated that the Appellant did file with the Board financial information with respect to the May 13 permit, but the information submitted had neither been signed nor audited. No information, financial or otherwise, was received with respect to the other permits. The witness stated that on June 21, 1984 the Board issued a notice that no more Special Occasion Permits would be granted. She stated that the Board had no evidence as to where the money was going in order to determine whether it was being used for charitable purposes.

On cross examination, the witness acknowledged that pursuant to Section 39(4) of the Regulations the holder of a Special Occasion Permit for fund raising shall, when required by the Board, submit to the Board a statement completed by a public accountant detailing receipts, expenses and the total cash proceeds donated for charitable, educational, religious or community purposes. It was acknowledged by Counsel for the Board in argument that no request for financial statements pursuant to Section 39(4) of the Regulations had been made to the Appellant.

Mr. Power who is the President of the Appellant organization testified on behalf of the Appellant and filed a series of exhibits including a letter from the Canadian Cancer Society dated June 21, 1983, confirming acceptance of proposed funds for a special event, a clipping from the Toronto Sun dated June 18, 1983 giving details of a fund raising event, a clipping from the Etobicoke paper dated April 23, 1984 providing a record of prior weekly events, a copy of a letter from the lottery licensing officer of Etobicoke issuing a lottery licence, copies of three press releases re the Lori Young fund raising events. The witness testified that in correspondence and conversation with the Ministry of Consumer and Commercial Relations he was advised that the existing Letters Patent of the corporation were sufficient and there was no need to amend the objects in the Letters Patent. He confirmed that he had never been requested for audited financial statements with respect to the events for which prior Special Occasion Permits for fund raising had been issued and that he had never been told by the Liquor Licence Board what the real problem was. On cross examination, Mr. Power stated that there are regular monthly meetings of the executive and that minutes are kept of these meetings. He confirmed that there were two bank accounts and that the President and Vice-President have signing authority for the bank accounts. He filed as an exhibit a financial statement for the period ending March 31, 1984. He acknowledged that the organization was incorporated as a non-share capital corporation in 1977 and that it had been inactive until 1983 when it was revived. He stated that the the Society had made donations to Etobicoke Minor Hockey Association, had hosted a softball tournament, had provided approximately $1,600.00 in aid to the Corner family, approximately $2,500.00 to the Lori Young fund and had provided money to the Scott family. The witness confirmed that as President of the Society he was a volunteer and was unpaid.

Counsel for the Board, in argument, referred to the Decision of the Liquor Licence Appeal Tribunal in the Appeal of Toronto Area Gays, Volume 4, Page 117, wherein the criteria was set out to determine whether an applicant qualified for a Special Occasion Permit for fund raising. This decision stated that the nature of the entity must be determined and, secondly, the role it performs must be examined. Counsel for the Board acknowledged that the Appellant meets the requirements with respect to the nature of the entity in view of the fact that it has obtained Letters Patent for a non-share capital corporation and the objects in the Letters Patent are "to promote and enhance the culture of Newfoundland in particular and the Atlantic Provinces in general". In addition, evidence was filed setting out the various types of cultural, athletic, recreational and fund raising projects of the Society as contained in the by-laws. However, Counsel argued that there was no evidence as to the role that the Society performed in order to establish it as an active organization or association. He stated that the financial statements filed as exhibits showed only $1,500.00 donated for charitable donations or other projects. He argued that the Society must establish a track record in order to qualify the charitable role for the Society. He stated that the Board had issued three permits and there was no evidence filed to show the results from the three events. Counsel argued that the Appellant was not entitled to a permit unless they can show that they are engaged in the advancement of either charitable, education, religious or community objects.

Mr. Power argued on behalf of the Appellant that the municipality, under its requirements, would only permit bona fide community organizations to use the building. He further argued that the issuance of a lottery licence with the approval of the municipality indicates the use of funds for recreational activities and referred to the past successful fund raising activities. He stated that if the question of disposition of funds had come up or if there had been a request for information pursuant to Section 39(4) of the Regulations, this information would have been provided, but it was the responsibility of the Board to ask for this information, not the responsibility of the Appellant to provide it voluntarily. Mr. Power argued that the newspaper articles which are a matter of public record indicated that the Society had been judged to be a non-profit fund raising group in the community.

Upon reviewing the evidence before it, the Tribunal is of the opinion that the Appellant does comply with the requirements of Section 39(2) of Regulation 581/80 of the Liquor Licence Act and that it has met the requirements of qualification as set out in the Appeal of Toronto Area Gays. Counsel for the Board has acknowledged that the Appellant has proper Letters Patent for a non-share capital corporation and that there is no need to amend the objects in the Letters Patent. The Tribunal finds that there is sufficient evidence to satisfy the second requirement in that the role that the Appellant performs is for the advancement of charitable, educational, religious or community objects. In order to qualify, it must only show compliance with one of those categories and it is shown from the evidence of Mr. Power that the Appellant has made contributions for both charitable and community objects. We would point out that the Board is entitled to continue to monitor each event for which a Special Occasion Permit for fund raising is issued in that it may require the holder of the permit to comply with the provisions of Section 39(4) of the Regulations.

The Tribunal, therefore, allows the Appeal and directs the Board to issue Special Occasion Permits for fund raising to the Appellant, subject to the Appellant complying with all other requirements with respect to any permit as set out in the Liquor Licence Act and the Regulations thereto.

NORTH NOTTAWAGA BEACH COTTAGERS ASSOCIATION
NOTTAWAGA CREEK RATEPAYERS ASSOCIATION
PROUDFOOT, BURNS
PROUDFOOT, MRS. MARY
SCOTT, JAMES
WAHNEKEWENING BEACH COTTAGE OWNERS ASSOCIATION

APPEAL FROM THE PROPOSAL OF THE
LIQUOR LICENCE BOARD OF ONTARIO

To approve the issuance of a dining lounge and patio dining lounge licence subject to certain terms and conditions

RE: PICCOLO CASTELLO TRATTORIA LTD.
(PICCOLO CASTELLO TRATTORIA RESTAURANT)

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, VICE-CHAIRMAN AS MEMBER
NEIL VOSBURGH, MEMBER

COUNSEL: BURNS PROUDFOOT, appearing in person, and as agent on behalf of Mrs. Mary Proudfoot and Nottawaga Creek Ratepayers Association.

JOHN RINGER, representing
Wahnekewening Beach Cottage Owners Association and
North Nottawaga Beach Cottagers Association
James Scott

E.P. FIKSEL, representing
Piccolo Castello Trattoria Ltd.

S.A. GRANNUM, representing the
Liquor Licence Board

DATE OF MEETING: 10th July, 1984

REASONS FOR RULING - NO JURISDICTION

The application for the licences herein was made on the 9th of November, 1983. A public meeting under section 6 (4) for the purpose of receiving the representation of the residents of the municipality to the Board concerning the application under section 6(3) was held on the 20th of March, 1984. At that meeting representations were made on behalf of Burns Proudfoot, Mrs. Mary Proudfoot, a member Nottawaga Creek Ratepayers' Association, James Scott and representatives from the Wahnekewening Beach Cottage Owners Association and North Nottawaga Beach Cottagers Association -- namely all of the persons on whose behalf representation is made today. At the conclusion of the meeting the member of the Board holding the meeting announced the decision to issue the licence subject to conditions.

Mr. Proudfoot at that time gave notice that he would appeal. On the 5th of April, the Board issued a notice of proposal to issue the licence subject to conditions. On the 2nd of April, Philip Adams on behalf of concerned cottagers (North Nottawaga Beach Cottagers Association) had written to the Board appealing the decision. On the 7th of April, Proudfoot wrote to the Tribunal appealing the decision.

On the 18th of April the Board gave notice of a hearing to be held on the 19th of June. At that time as set out in a letter dated June 19th from the Chairman to Mr. Fiksel ".....it was mutually agreed by yourself and counsel for the persons in opposition, that is, Mr. John L. Ringer, that this matter should be entertained by the Commercial Registration Appeal Tribunal....."

The Tribunal on its own initiative has raised the issue of its jurisdiction to hold the hearing. The Tribunal has had occasion to review the consideration of jurisdiction in re: Centennial College, 1981 (5) L.L.A.T. At page 6 the general principle is set forth:

> "The jurisdiction of the Tribunal must be found within the statutes by which the Tribunal is governed. The Tribunal is bound by the law as all authorities are bound by the law. The Tribunal's authority and powers have to be found within The Act. It is bound to interpret and apply The Act as the legislature has decreed."

The Tribunal therein cited The Act; page 7--
(with reference to a hearing by the Tribunal)--
Section 14:
(1) "any party to a proceeding before the Board under section 12 who is aggrieved by the decision of the Board may..... deliver to the Board and the Tribunal a notice in writing requiring a hearing by the Board."
(2) "any person to whom a notice is given under section 11 may require a hearing by the Tribunal by giving notice in accordance with sub-section (1) notwithstanding that he has not first required a hearing by (1) the Board."

Section 12:
(1) "Where the Board is required to hold a hearing under section 11:

Section 11:
(1) "Where the Board proposes ....
(c) to attach terms and conditions to a licence...,
it shall serve notice of its proposal together
with written reasons therefore, on the applicant...,
(3) "A notice under sub-section (1) shall inform the applicant..., that he is entitled to a hearing by the Board....and he may so require such a hearing."
It is clear that the three sections, sections 11, 12, 14, must be read together in the determination of the Tribunal's jurisdiction.

No hearing under section 11 has been required by the applicant for licence to be held under Section 12. Counsel for the Appellant has stated that the Applicant made no objection at the Board hearing on June 19th, to the Board holding a hearing. The Tribunal is of the opinion that that does not prevent the issue of jurisdiction to be considered by the Tribunal. In the Centennial case on Page 9 the Tribunal reiterating its basic principle that the Tribunal is bound by the provisions of the Statute said this: "The Liquor Licence Board of Ontario cannot confer jurisdiction on the Tribunal; it is the legislature that confers jurisdiction upon the Tribunal. The Tribunal must take its powers, and its authority must emanate from the Statute." The Board cannot confer jurisdiction upon the Tribunal neither can the parties confer jurisdiction upon the Tribunal, which is not provided for by statutes. And this is so whether such is done by consent or lack of objection.

In considering section 14(1):

> "Any party to a proceeding before the Board under section 12....."

The Tribunal has had occasion in re Brantford Harlequin Rugby Club 1982 (6) L.L.A.T. at Page 10 to state a principle: "Counsel for the club has submitted that before the Tribunal can exercise this power set out in sub-section 5, the hearing itself must be properly constituted. The Tribunal agrees." Accordingly before there can be an appeal from a proceeding before the Board, that proceeding must be properly constituted. The Tribunal finds that is not the case in this instance. The right to give notice requiring a hearing is given to the Applicant; it is he who is entitled to a hearing by the Board.

In considering 14 (2):

> "Any person to whom a notice is given under section 11 may require a hearing by the Tribunal......"

The Tribunal is of the opinion that the ...'any person', is restricted to those referred to in the section, namely the holder or the applicant (as in this instance). The Board cannot confer the entitlement to a hearing upon someone ....who is not entitled under the section; it cannot confer upon someone a right of appeal by virtue of the giving a notice.

The Tribunal has had occasion to express its opinion upon a review and redetermination of public interest in re Frank's Restaurant 1982 6 L.L.A.T. Page 11:

> "The Tribunal finds that the legislature intended that the Tribunal provide a further opportunity for a review of a matter at the instance of the public via a member thereof and a redetermination of the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located in those instances, where the Board has issued a Notice of Proposal to Refuse and then decided to issue after a Hearing."

The Tribunal notes section 11(4):

> "Where an Applicant.... does not require a hearing by the Board in accordance with Sub-section 3 the Board may carry out the proposal stated in its notice under sub-section (1)."

For the Tribunal to hold a hearing and come perhaps to a different conclusion would interfere with the power of the Board given by the Legislature under section 11 (4).

Accordingly the Tribunal finds it has no jurisdiction to hold a hearing in the matter requested.

VASILLIOS OUZOUNIS, Licensee of
PROS RESTAURANT now known as
OCEAN QUEEN RESTAURANT

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

to refuse to remove the terms and conditions
attached to the Dining Lounge licence.

RE: COXHEAD, JOAN
FRASER, LUBA
GLEN ANDREW COMMUNITY ASSOCIATION
MUSHINSKI, ALDERMAN MARILYN

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
LACHLAN CATTANACH, Q.C., MEMBER
ROBERT COWAN, MEMBER

COUNSEL: PAUL J. SCHRIEDER, Q.C., representing the Appellant

COUNSEL: S. A. GRANNUM, representing the Liquor Licence Board

JOAN COXHEAD, representing the Local Residents
LUBA FRASER, representing the Local Residents
GAY ABBETE, Agent on behalf of Alderman Marilyn Mushinski and Glen Andrew Community Association

DATE OF
MEETING: 25th July, 1984

REASONS FOR RULING

The licence herein is subject to certain terms and conditions. An application for a removal of the terms and conditions was made on or about the 28th day of September, 1983. A Notice of Proposal to refuse to remove the terms and conditions was issued by the Liquor Licence Board of Ontario on or about the 16th of November, 1983. A Notice of a hearing, dated the 29th of November, 1983, was issued for a hearing in the matter before the Board which commenced on the 19th day of January, 1984. The Board members present at the commencement of the hearing were the Rev. Canon B.G. Brightling, Ms. K. J. Arkin. The hearing was adjourned and was continued on the 26th day of April, 1984 before a panel of the Board consisting of the Honourable Michael Starr and the said Ms. K. J. Arkin. The Decision with respect thereto, Exhibit 1B, in the matter was signed by the Honourable Michael Starr and Ms. K. J. Arkin.

It has been submitted on behalf of counsel for the Appellant that the procedure followed by the Board including that change which consisted of the change of the panel and the finalization of a Decision by a panel who did not sit in total on the 19th of January but only on the 26th of April, 1984 made the Decision a nullity and that the Decision never existed.

The Tribunal agrees that the said Decision of the 26th of April was a nullity. The Tribunal has made an oral decision of June 13th not yet reported, in re: Federico and Yolande Marrelli, licensees of Country Place Tavern, where having found that since the Decision of the Liquor Licence Board was a nullity, the Tribunal ruled it was not empowered to hold a hearing in the matter.

Counsel for the Appellant has also submitted that the Tribunal has the power to hold a re-hearing. The Tribunal has had occasion to have decided that once the Decision is made and issued the Tribunal is functus officio.

The Tribunal has followed the procedure set out in the Manual of Practice prepared by D. W. Mundell. Q.C. in which there is referred on page 26, 7(1).

> "Doctrine of 'functus officio':
>
> Under this doctrine when a Tribunal has conducted its hearing and has arrived at and delivered its final Decision and Order, the Tribunal can take no further action the powers of its offices are exhausted. It cannot therefore change its decision or vary it in any way.
>
> Because of the strictness of this rule, many statutes provide that a Tribunal may reopen its decision and vary it or may make a new decision. In the absence of such a provision, a Tribunal cannot do so."

Accordingly, the Tribunal is not enabled to re-hear and as a result of such re-hearing, change its Decision of July 9, 1980.

Accordingly, the Tribunal finds it has no jurisdiction to hold a hearing in the matter requested.

GEORGE TATSIOPOULOS
(VANCKERS RESTAURANT)

APPEAL FROM THE DECISION OF THE LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
ROBERT COWAN, MEMBER

COUNSEL: S. A. GRANNUM, representing the Liquor Licence Board

KEVIN O'SHEA, representing Tom Jakobek

BRIAN G. McKENNA, appearing in person

No one appearing for the Appellant.

DATE OF
HEARING: 6th June, 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 14(3) of the Liquor Licence Act, no one appearing for the Appellant, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 6th day of March, 1984. *

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* Note: The above decision was filed with the Supreme Court of Ontario (Divisional Court) for Judicial Review. It had not been concluded at the time of this publication.

373857 ONTARIO LIMITED
(LICENSEE OF BOBBY JO'S RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

REFUSING TO ISSUE AN ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
F. THOMAS PEOTTO, MEMBER

COUNSEL: W. BRUCE AFFLECK, Q.C., representing the Appellant

S.A. GRANNUM, representing the Liquor Licence Board

ROBERT HOLLAND, representing the City of Oshawa

DATES OF HEARING: 14th December, 1983 and
7th February, 1984 Oshawa

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Order of the Liquor Licence Board of Ontario dated the 28th day of July, 1983, whereby an application for an entertainment lounge licence in respect of the premises known as "Bobby Jo's Restaurant" situate at 633 King Street East, in the City of Oshawa, was refused.

The Licensee is the holder of a dining lounge licence No. 021439, which licence was originally issued in December of 1978, and the Appellant has been the licensed owner of the premises since June of 1981. The premises licensed as a dining lounge consist of two areas with a total capacity of 202 persons.

On or about the 8th day of March, 1983, the Licensee applied to the Liquor Licence Board for an entertainment lounge licence for the said premises. On the 24th day of May, 1983, the Liquor Licence Board issued a Notice of Proposal to refuse to issue the said entertainment lounge licence because the issuance of the said licence is not in the public interest having regard to the needs and wishes of the residents in the municipality in which the premises are located. A hearing was requested by the Licensee before the Liquor Licence Board and, as a result of that hearing, the Board issued its decision refusing the entertainment lounge licence.

Mr. Holland, counsel for the City of Oshawa who was opposing the application, called as his first witness Bruce Hunt who was the Head Planner of the Planning and Development Department for the City of Oshawa. The licensed premises are situated in a small commercial plaza on the south side of King Street which is a main thoroughfare permitting one-way traffic in an eastbound direction at this location. There are actually two separate plaza buildings at this location which are side by side. The areas to the south, east and west are mainly single-family residential. There is a larger commercial area on the north side of King Street across from the subject site, but to the east of this commercial area there is located a church and a separate school. The witness gave a history of the zoning of the site from the time that it was rezoned from residential to retail commercial in 1970. It appears that in 1978 an application was made to the local Committee of Adjustments for a variance from a requirement of 74 spaces to permit a restaurant down to a minimum of 67 spaces and this variance was granted. In October of 1982, the Licensee introduced entertainment in the form of exotic dancers in conjunction with the dining lounge licence and the premises have been used for this purpose since that time. It appears that immediately after the Licensee introduced the adult entertainment, many letters of objection were sent by residents of the area to the Mayor and Council of the City of Oshawa. Copies of these letters were filed with the Tribunal. Mr. Hunt testified that, as a result, the Council of the Corporation of the City of Oshawa, passed a By-law No. 13-83 to define the areas in the municipality in which Adult Entertainment Parlours may or may not operate which did not include the location which is the subject of this appeal. The by-law approved three areas for Adult Entertainment Parlours, one of which was in the downtown core of the City and the other two were located in industrial areas on the west limits of the City of Oshawa. Mr. Hunt testified that these areas were selected because of their relative suitability for the purposes of Adult Entertainment Parlours. One of the matters to be considered in determining the approved areas was their proximity to residential areas and the location of schools and churches. In addition, the origin of patrons to these premises was a matter to be considered. He stated that the Bobby Joe's restaurant is in a strip commercial area, but the general area is mainly residential and is not close to a major market draw for adult entertainment. Mr. Hunt testified that if there was an application at this time for approval to construct the commercial plaza which includes the restaurant together with offices and a balance of retail space, the minimum parking requirements of the City of Oshawa zoning by-law would be 93 parking spaces and that since there are only 67 parking spaces in the plaza, this would be a shortfall of 26 spaces.

On cross-examination, Mr. Hunt confirmed that the formula to determine the minimum requirement for parking spaces was in accordance with By-law No. 55-73 and that there were various other violations of the minimum parking requirements in the City. He also confirmed that there were other taverns within the City of Oshawa close to churchs and schools, including the Simcoe Tavern and the Corral Restaurant. He also confirmed that Bobby Jo's Restaurant had a history of entertainment prior to the strip shows and that the restaurant would be an appropriate commercial site according to the zoning by-law established in 1974. Mr. Hunt also confirmed that there had never been any prosecution commenced by the City of Oshawa against Bobby Jo's Restaurant.

The next witness called by Mr. Holland was Michael Bilsky who operates a restaurant business in the adjoining plaza and he appeared in opposition to the application for the entertainment lounge licence. Mr. Bilsky testifed that since the inception of the strip show type of entertainment, there was a serious parking problem in both the plaza where his restuarant is located and in the adjoining plaza where Bobby Jo's Restaurant is located. Mr. Bilsky testifed that his restaurant which is a take-out type of restaurant, is located at the far end of the adjoining plaza and there are approximately 20 parking spots for their plaza. He testified that many times on a Thursday and Friday night the parking lot is totally filled by customers of Bobby Jo's Restaurant. He stated that many of his customers drive in and leave without entering his premises because there is no parking. He also objected to the problem of harassment of his staff by customers of Bobby Jo's Restaurant and general problems because of the type of person drawn to the adult entertainment offered by the Licensee.

On cross-examination, Mr. Bilsky confirmed that there was parking available at the rear of his premises and that there was no sign to indicate that there was parking in the rear. He stated that there was a sign at the entrance to his plaza limiting parking to patrons of that plaza, but that the sign did not stop the problem. He stated that he had complained to the Oshawa police on at least four occasions over the last month. The problems mainly exist on a Thursday and Friday night. He stated that he could not consider the use of a pay-duty policeman because he could not afford this cost. Mr. Bilsky acknowledged that he had not talked to the manager, but that he had phoned on occasion giving a list of car licence numbers, but had very little response.

The next witness called by Mr. Holland was Frona Stouffer who had operated a variety store near Bobby Jo's Restaurant. She stated that her lease was terminated and the reason given was the fact that she was objecting to the operations being carried on at Bobby Jo's Restaurant. She stated that many of her customers objected and that she had many problems with the behaviour of the patrons from the restaurant, including broken bottles, patrons being sick and other unsightly behaviour. She stated that the problems only commenced after the restaurant began providing the adult entertainment. Mrs. Stouffer stated that many of her customers complained to her that they were being harassed and young children stopped coming to her store.

On cross-examination, Mrs. Stouffer stated that her business dwindled down to practically nothing. She stated that patrons of Bobby Jo's Restaurant started to line up at 11:15 in the morning and that there were continuous shows all day. She acknowledged that she had difficulty paying rent and that this had been a problem prior to October of 1982. She, however, stated that in August of 1982 business had improved and had continued to improve during the months of September and October of 1982. It was only after the Licensee began to provide the adult entertainment that she had a drastic reduction in her business. Mrs. Stouffer confirmed that she presented petitions to the City of Oshawa, the Durham Board of Education and the Durham Separate School Board, asking for a by-law to control the type of entertainment. Mrs. Stouffer confirmed that she has four children, one of whom is still going to school in the area, and that she lives on Wilson Road, several blocks south of King Street. She stated on re-examination that children from the residential area adjoining the plaza walked by the plaza on the way to and from school, but that once the adult entertainment was provided by Bobby Jo's Restaurant, children stopped coming into her store.

The next witness called by Mr. Holland was Mrs. Linda Dionne, a member of the Board of Trustees of the Durham Board of Education. She stated that at a meeting of the Board held on November 8, 1982, a petition was presented by Mrs. Frona Stouffer objecting to the adult entertainment provided by Bobby Jo's Restaurant and that this petition was supported by approximately 40 residents of the area who were present at the meeting. As a result, the Board passed a resolution objecting to this type of entertainment being permitted at this location and gave as their reasons their concern for the safety and moral issues involved for hundreds of young people in Oshawa. Mrs. Dionne testified that there are approximately 4,200 students attending six elementary and two secondary schools in the area. She stated that traffic was very heavy and that the disorderly conduct of patrons of Bobby Jo's Restaurant should not have to be tolerated by any student.

The next witness called by Mr. Holland was Thomas Simmons, a member of the Durham Regional Separate School Board. He objected on behalf of the Board to the application for an entertainment lounge licence. He stated that a separate school was located across the street and very close to the licensed premises and that approximately 200 elementary school children attended this school. He stated that there was no objection to the original application for a family restaurant, but that when the "strip joint" was opened by the Licensee the Durham Regional Separate School Board requested the City of Oshawa to bring in legislation for prohibiting this type of operation. He stated that he received several calls from concerned parents in the area as did other members of the Board and he went down to view the site and talked with various neighbours. Mr. Simmons stated that on November 17, 1982, he went down to the school after receiving calls from two parents and found that patrons of Bobby Jo's Restaurant were using the school parking lot. Mr. Simmons confirmed that the Durham Regional Separate School Board still objected to the application for the entertainment lounge licence.

Geoffrey Francis Holt who operates a pet food business in the plaza was called and expressed his opposition to the application. He confirmed that he was opposed to the present entertainment mainly because of the behaviour of some patrons of Bobby Jo's Restaurant and because of certain harassment to some of his female employees. He stated that the plaza as a whole was degraded and that the operation had an effect on that portion of the community who may want to use other facilities in the plaza. He had had much correspondence with the landlord setting out his objections, including the interference with adequate parking for his customers. He confirmed that he had called the police department, but was told by the police officer attending at the plaza that they could not respond to private complaints. He stated that since the restaurant was providing the entertainment in the form of exotic dancers, his gross revenue had declined by approximately 15 percent and he attributed it to the Bobby Jo's Restaurant's operations.

The next witness called by Mr. Holland was Clay Thompson who was a general insurance agent and had been in the plaza for approximately five years. He stated that he opposed any change in the licence as it would increase the parking problem. He stated that most accounts were paid by women clients and several women had phoned to say that they would not come to the plaza because of the behaviour of Bobby Jo's Restaurant's patrons. He instructed his employees not to park in the rear parking lot because of possible harassment. He also confirmed that he has made arrangements to attend at clients' homes to pick up cheques in payment of accounts when they refuse to come to the plaza. Mr. Thompson also confirmed that his solicitor had written to the landlord on his behalf complaining about the lack of parking.

Mr. Holland called two more witnesses, one Maureen Daigle, who represented a women's group called "Outreach". Her group was concerned about violence against women and children and she was opposed to the type of entertainment at Bobby Jo's Restaurant being permitted anywhere in the City. She stated that children are at risk when they are in the vicinity of strip shows. Mrs. Daigle does not live in the immediate area, but resides on Northgate Crescent in the Taunton Road area. The other witness called by Mr. Holland was Mrs. Debra Lee Dow who stated that she was a concerned local citizen. She has two children aged nine and 11. She stated that she used to be a customer of the plaza but would only patronize the plaza before 11:30 in the morning. She stated that she would no longer permit her children to go to the variety store in the plaza.

Mr. Grannum, counsel for the Liquor Licence Board, called as a witness Charles Rycroft, an investigator with the Board. Mr. Rycroft had made three inspections and had filed three reports dated August 17, 1982, October 15, 1982, and January 25, 1983. The main reason for his investigation was to monitor the liquor and food ratios and the investigation in January of 1983 was an intense investigation over a period of two days. On January 13, he found that the food sales represented 38 percent of the total sales and on January 14, the food sales represented 36 per cent of the total sales. He stated that the failure to meet the required ratio was only a marginal infraction.

Allan L. Leslie, an inspector with the Liquor Licence Board for nine years, was called and confirmed that his territory was the whole of the Durham region. He was requested by Sergeant Baker of the Durham Regional Police Department to attend at the premises to inspect all of the operations including the food operation. He confirmed that he visited Bobby Jo's Restaurant 14 times in 1983 and that at all times the service of food seemed adequate. He stated that he was not aware of any audience participation or indecent exhibitions with respect to the exotic dancers. He also checked on the possibility of minors being in the premises together with the question of supplying liquor to intoxicated persons. On cross-examination, Mr. Leslie confirmed that he was satisfied that the present operation was complying with the requirements of the Board. He stated that there was a parking problem in the front of the premises from time to time, but he was always able to park at the back of the premises. He stated that the management of the restaurant was always very co-operative.

Mr. Affleck called as his first witness for the Appellant Detective Sergeant Frederick Baker of the Durham Regional Police Department. He was responsible for the inspection of taverns and had been to Bobby Jo's Restaurant between ten and 15 times over the past year. He usually attended the restaurant in the evening, but was there once or twice in the afternoon. He stated that he never had any trouble parking, but that he always parked either behind the building or in the parking lot of the adjoining plaza. He stated that he recommended approval of the application for the entertainment lounge licence mainly because it would prohibit minors from entering the licensed premises. However, he confirmed that he had never seen any children in the premises on any of his visits. He confirmed also that he had had no problems with the management of the restaurant and that there had been no increase in the accidents in the area as a result of the traffic flow. He confirmed that there had been some complaints from women with respect to the behaviour of patrons from the restaurant and he detailed two uniformed officers to watch for unruly behaviour. The report received by Detective Sergeant Baker was that the patrons of the restaurant were boisterous when leaving, but there was no justification for action being taken. He confirmed that there were complaints re the sound system and the unruly behaviour of customers. There were also numerous complaints with respect to the parking, but he stated that this was a problem for the plaza owners. Sergeant Baker stated that he felt that there were some legitimate complaints, but that there was not sufficient evidence to justify the laying of any charges against the patrons.

On cross-examination, Sergeant Baker confirmed that his usual investigations were between 8:00 p.m. and 11:30 p.m., and that he had no knowledge of the parking problems at noon or at the dinner hour. He stated that he conducted no investigation of accidents, but would have expected the inspector of the division in that area to report any exceptional number of accidents.

The next witness called by the Appellant was Glenda Marie Brindle who had been the manager of Bobby Jo's Restaurant since October of 1982. She stated that parking was a problem at the beginning, but that she no longer considered it to be a problem. She was at the restaurant daily from 9:00 a.m. to 6:00 p.m., Monday to Friday. She stated that she approached various other tenants of the plaza to see whether they were interested in having a parking lot attendant and she was advised that they did not want to participate. She stated that she was in and out of the restaurant between ten and 15 times per day, but never saw any disorderly conduct. She stated that the only complaints received by her were with respect to parking and that if she was provided with a licence plate number, she would put it over the public address system in the dining lounge. She stated that the lounge was rarely filled to capacity and that there were no lineups. On cross-examination, she confirmed that she was busy in the kitchen at the peak times between 12:00 noon and 2:30 p.m. and between 5:30 p.m. and 7:30 p.m.

Mr. Affleck called as the next witness on behalf of the Appellant, Brian Patrick Brindle who was a police officer with the Metropolitan Toronto Police Force and is the husband of Glenda Brindle, the manager of Bobby Jo's Restaurant. He stated that he went into the restaurant quite often because his wife works there and on the many occasions that he was in the restaurant he saw no infractions of either the Liquor Licence Act or the Criminal Code.

Mr. Affleck called one additional witness, Carl Mason, who was also a police officer in Metropolitan Toronto and was very often a customer of Bobby Jo's Restaurant. He stated that he never found any parking difficulties and at no time did he ever witness any minors in the dining lounge. He confirmed that he would be at Bobby Jo's Restaurant only in his capacity as a private citizen.

In argument, counsel for the City of Oshawa stated that parking is important in that it is an aspect of community need and because of the way a plaza works. If parking in a plaza is poor, it affects the way that the plaza serves the community. The lack of availability of parking is a symptom of what is happening to this plaza and is confirmed by the evidence of customers not being able to get to their merchants. Mr. Holland referred to the evidence of the Planner with respect to the deficiency in parking and that a deficiency of 26 spaces is more than theoretical. This is important to the merchants in the plaza whose livelihood depends on the availability of parking. He referred to Mr. Thompson's evidence of a loss of business and also a loss of status and reputation because of the reputation of the plaza. He submitted that if there is a conflict of evidence between the merchants and the witnesses called on behalf of the Appellant, more weight should be given to the merchants' evidence since they are there all of the time. He also referred to the fact that there was some suggestion that minors would be protected if there was a change in the category of the licence to an entertainment lounge licence. He stated that there was no real problem with minors at the present time and referred to the evidence of Sergeant Baker and Mrs. Brindle. Mr. Holland confirmed that the City of Oshawa had passed a by-law limiting the location of Adult Entertainment Parlours in response to the Bobby Jo's Restaurant's situation. He stated that the position of the City of Oshawa was that Bobby Jo's Restaurant was not a legal non-conforming use but, because of the unsettled state of the law, no formal action had yet been taken against the Appellant.

On the question of community interest, Mr. Holland stated that the evidence was overwhelming that the application for the new licence is contrary to the needs and wishes of the public in the municipality in which the premises are located. He referred to the representations made to both school boards, the copy of the petition of 984 signatures which was filed, the evidence of the businessmen and merchants in the plaza and the evidence of the customers. He stated that By-law No. 13-83 was passed to create areas so that the operation of Adult Entertainment Parlours would be located in areas so as not to offend the citizens of the municipality. Mr. Holland submitted that on the basis of the evidence before the Tribunal, the appeal should be dismissed.

Mr. Grannum, on behalf of the Board, stated that the evidence referring to the food/liquor ratios was not pertinent while this appeal was pending. He submitted that the Tribunal must look to the needs and wishes of the public both in support and opposed to the granting of the new licence. Mr. Grannum argued that no new licence should be granted pending the resolution of the question of the validity of the City of Oshawa by-law.

Mr. Affleck argued that the matter before the Tribunal was a very narrow issue. He stated that there is a presumption that the applicant is entitled to a licence unless it falls within one of the exceptions set out in Section 6(1) of the Liquor Licence Act. He stated that the relevant issue before the Tribunal is the question of the application for an entertainment lounge licence and not the morality of the exotic dancers. He stated that the needs and wishes of the public must be considered only with respect to the application for the expanded licence. He stated that the evidence resolved itself into two types. Firstly, the evidence of people directly affected, namely the tenants, and secondly, those persons with a broader scale interest. He referred the Tribunal to the fact that the petition of 984 signatures referred to the operation of the current adult entertainment and had nothing to do with the application for the extension of the liquor licence. He further stated that the objections of the school boards had no merit in that there was no evidence that the children who attend school could be affected by the granting of the entertainment lounge licence. Mr. Affleck submitted that the onus is on the objectors to show why the application for the entertainment lounge licence should not be granted and that this onus had not been satisfied.

The main issue before the Tribunal is whether the issuance of this additional licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located. This is the express wording contained in Section 6(1)(g) of the Liquor Licence Act. The question of parking is only important as it relates to this Section. In addition, the question of whether the licensed premises are a legal non-conforming use under the Adult Entertainment Parlour by-law of the City of Oshawa is not an issue to be decided by this Tribunal.

After reviewing the evidence, the Tribunal is of the opinion that the application for an entertainment lounge licence must be refused. The preponderance of evidence submitted to the Tribunal was evidence of persons opposed to the issuance of the licence and they were unanimous in the position taken by them that they did not need nor did they want the licence to be issued as it was not in the public interest. The application was opposed by the City of Oshawa and the two school boards as a result of petitions by the citizens of the area, and there was the direct evidence of six persons opposed to the licence including four merchants in the plaza. The Tribunal is of the opinion that the objectors have satisfied the onus required of them under Section 6(1)(g) of the Liquor Licence Act.

KONSTANTINOS TSAROUCHAS
(LICENSEE OF G & G RESTAURANT)

APPEAL FROM THE DECISION OF
THE LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
DR. STUART ROSENBERG, MEMBER
ROBERT COWAN, MEMBER

COUNSEL: J. FAUST, representing the Appellant

S. A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 25th May, 1984

REASONS FOR DECISION AND ORDER

This is an Appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 1st day of December, 1983, whereby the Board attached a "TERM AND CONDITION" to the dining lounge licence of the Licensee in respect of his premises known as "G & G Restaurant", 881 Bloor Street West, in the City of Toronto, requiring that the sale and service of alcoholic beverages in the licensed premises shall cease at 10:00 p.m. daily.

The Board originally issued a Notice of Proposal on the 3rd day of February, 1983, proposing to attach the said "TERM AND CONDITION" and, as a result, a Hearing was held before the Board on the 24th day of March, 1983. At that time the Board's Decision was withheld for a period of six months, during which period the members of the Board's inspection staff were to attend at the premises to undertake monitoring procedures with respect to the food/liquor ratio. This Hearing was then continued on the 1st day of December, 1983, at which time the Board issued its Decision attaching the said "TERM AND CONDITION".

The first witness called on behalf of the Board was Leslie William Hebbard, an investigator with the Liquor Licence Board for two and one-half years. He testified that he attended at the G & G Restaurant on October 12, 198 shortly after noon and requested a menu. The waitress advised that she was not sure that she had the proper printed menu and the menu actually produced was not valid at that time. Mr. Hebbard left the premises and returned at 2:00 o'clock in the afternoon and identified himself to the Licensee. He asked to inspect the books and records. He stated that a daily sales journal was maintained from the daily cash register tape stubs, but there was no backup documentation. There were no detailed cash register tapes and, although figures were being copied from the tapes, they were not the figures supplied to the Liquor Licence Board. Mr. Hebbard advised that the accountant for the restaurant had explained to him that for each of the months of April and May in 1983 the sum of $600.00 had been added to the food totals and this was explained as being estimates of free meals to employees and friends. Mr. Hebbard testified that most of the customers of the restaurant did not come in to eat, but seemed to be regular customers who came in only to drink beer. He stated that there were many discrepancies on the sales tapes, some amounts being rung up as food which did not correspond with any menu items. Proper purchase invoices for food were not being maintained as required. He was advised by the Licensee that these invoices were at home, but when he returned on October 14 to examine the invoices they were never produced. The Licensee advised that he was too busy at the time.

Mr. Hebbard monitored the operations of the restaurant on October 14 and the figures for liquor sales for the day were shown to be $363.00 and food sales to be $176.00 which resulted in a 63/37 liquor/food ratio. Mr. Hebbard stated that he could not accept these figures. He was in the premises from 11:00 a.m. to 10:00 p.m. and there was not a sufficient sale of food to be equivalent to $176.00. He stated that there was much draft beer sold and, in the opinion of the witness, the proper liquor/food ratio would be approximately 75/25. Mr. Hebbard talked to the waitress as to the manner in which records of food sales were kept. She advised that they were written out on guest checks. An examination of the guest checks indicated that only $6.75 in food had been sold, but that $59.25 had been rung through the cash register as food sales. Mr. Hebbard submitted as evidence figures with respect to the monthly ratio taken from the sales journal which were different from the monthly ratio figures submitted to the Board. He submitted that the journal figures of the Licensee could not be accepted because they were from cash register tape stubs without any backup. He stated that his observation of the operations in the restaurant indicated no emphasis on the sale of food and that customers were rarely asked what they wanted to eat. He stated that on his last visit there were only three menus available in the restaurant.

Mr. Hebbard filed a further report dated May 2, 984, confirming his re-attendance at the premises on April 24, 984. He had made a request in writing for the invoices for ood purchases but that upon his return he was advised that the eceipts and invoices had been sent to the lawyer. Mr. Hebbard estified that he called the solicitor for the Licensee who tated that he did not have the receipts and invoices.

Mr. Hebbard contacted both the Liquor Licence Board f Ontario and Brewers' Retail and received from them the igures for purchases for the six-month period from October of 983 to March of 1984 and, based on figures supplied by the icensee as to the selling price for various liquor and beer, r. Hebbard estimated that total projected beer and liquor ales for the six-month period would be as follows:

October, 1983	-	$ 23,240.00
November, 1983	-	16,577.00
December, 1983	-	16,462.00
January, 1984	-	25,119.00
February, 1984	-	17,173.00
March, 1984	-	13,590.00
Total		$112,161.00

During the same six-month period, the Licensee eported total liquor sales of $54,351.35. Mr. Hebbard estified that based on the information received with respect o the purchase of draft and bottled beer and the prices harged, he was purchasing sufficient quantities so that the eer sales alone would be in excess of the total sales ubmitted to the Board for both beer and liquor.

Under cross-examination, Mr. Hebbard acknowledged hat the restaurant caters to the Greek community and that most f the conversation in the restaurant is in the Greek anguage. He advised that his instructions from the Board were o inspect the books and records and make general observations nd that he had no preconceived notions. He stated that his elief that the cash register sales were not being properly ung up were based on the amount of food served and he referred o his October 12, 1983 report in this connection. Mr. Hebbard acknowledged that on his visit to the premises in April of 1984, he did not inspect the liquor storage area, but he knew that there was not a large stock of liquor in October and he believed the liquor stock to be entirely behind the bar. When questioned with respect to his opinion of the 75/25 ratio, he stated that he felt he was being generous. In his opinion, as a result of his observation of the operations of the restaurant, Mr. Hebbard believed that the Licensee was understating his liquor sales and overstating his food sales.

Counsel for the Appellant called Peter Adamidis who had been the accountant for the Licensee since 1979. He testified that he kept all records and journals and the information was supplied to him by the Licensee from the cash register. He did not perform any audit. Mr. Adamidis confirmed that he prepared the figures which were submitted to the Liquor Licence Board setting out the liquor/food ratios, and which figures were filed as Exhibit No. 7 before the Tribunal. He testified that Mr. Tsarouchas or his wife would provide the cash register tapes to him on a monthly basis. He testified that for the months from August of 1983 to April of 1984 the Licensee either met or was very close to the proper liquor/food ratio. The witness confirmed that he was aware of the requirements of the Liquor Licence Act. Mr. Adamidis testified that he had lunch in the premises three or four times a week and was in the restaurant every day for a few minutes. He confirmed that there was always a full meal menu and that food was always in the process of being served. He stated that previously there had been two cooks who were employed, but that there had only been one cook since March of 1984.

On cross-examination, Mr. Adamidis confirmed that there had been a ratio problem at the beginning, but that he believed that the Licensee kept accurate accounts. He could only use the information actually received from the Licensee. He stated that he never saw the invoices for purchases but only received the cancelled cheques.

Konstantinos Tsarouchas, the Licensee, was called as a witness and he confirmed that he had owned the premises since August of 1982. This was his first experience in the restaurant business and he confirmed that his wife ordered the food and liquor. He stated that ever since the first Hearing before the Liquor Licence Board in March of 1983, he had attempted to correct the ratio problem by hiring a second cook, placing signs of food specials in the windows of the restaurant and advertising in the Greek community. He stated that there had been a definite improvement in the food sales since

December of 1983 and that lunch time was now very busy. He stated that his present stock of liquor and beer consisted of approximately $6,000.00 in liquor and $4,000.00 in beer. Mr. Tsarouchas filed as exhibits a series of cheques covering the purchase of food which indicated purchases of $8,029.92 for a three-month period. He stated that in an attempt to increase the food sales ratio he had cut out the "happy hour" in November of 1983. He testified that spillage loss would be equivalent to between 10 to 15 per cent of his liquor sales and approximately ten glasses of beer per day. He confirmed that customers were given checks for all sales including bar drinks and that some of the sales were punched in right away, but that when they were busy some sales were not punched in until later.

On cross-examination, Mr. Tsarouchas confirmed that he had been closing at 10.00 p.m. since December of 1983. He stated that he had no knowledge of the amount of beer and liquor in stock in October of 1983.

In argument, Mr. Grannum stated that at the time that the original Proposal was issued in February of 1983, the ratio was 77 per cent liquor to 23 per cent food and, as a result of the Licensee's appearance before the Board, the Board allowed him a period of six months in order to make an attempt to change the ratio. He stated that between the months of March and September of 1983, it would have been a simple matter to supply proper information to establish that he was meeting that ratio but that the refusal to provide such information indicated an attempt to hide the true facts. When Mr. Hebbard, the investigator for the Board, made a further inspection in April of 1984 there was still a refusal on the part of the Licensee to provide proper information. He stated that even today there were no customer checks and no way to detemine the accuracy of the reported figures. Mr. Grannum argued that the whole issue is whether the Licensee is making a valid attempt to promote the sale of food and meet the ratio and his failure to produce proper evidence leaves the inference that the ratio was not being met. He submitted that the penalty imposed by the Board should remain in effect until such time as the Licensee is able to properly comply with the food/liquor ratio as imposed by the regulations to the Act.

Counsel for the Appellant argued that the Board had produced only circumstantial evidence and that although some of the observations of Investigator Hebbard were accurate, some were not. He stated that Hebbard's evidence falls far short of establishing that the Licensee was presently failing to meet his ratio. He stated that these observations were based mainly on Mr. Hebbard's projection of liquor sales and his own observations with respect to food sales. He stated that the main argument of the Board is that the Licensee was not interested in the sale of food, but that this was offset by the exhibits filed establishing substantial food purchases. He argued that the explanation of the projected liquor sales discrepancies could be explained away by the "happy hour" in the fall of 1983, the free drinks given to patrons and the problems with respect to spillage. Mr. Faust argued that the Licensee is in a difficult position in that his establishment is in a working class area and that he cannot sell his food at a high price. He submitted that the Licensee should be allowed to operate on a full licence, but subject to the imposition of strict conditions respecting reporting.

The evidence before the Tribunal confirms that the Licensee was not meeting the proper ratio as required by Section 9(6) of Regulation No. 581 of the Act on the basis of the figures filed with the Board until the spring of 1983. Since that time, the figures as actually filed indicate that the Licensee has, in fact, been meeting or has been very close to meeting the ratio since April of 1983. However, the accuracy of the figures filed is very much in doubt. There is the direct evidence of Mr. Hebbard, the Board investigator, who on the day that he was present for approximately 11 hours indicated that there was no way that there could have been the amount of food sales as actually entered in the journal. This is as a result of his direct observation. In addition, the Tribunal is of the opinion that the Licensee has not properly explained the stark fact that for a period of six months from October of 1983 to March of 1984, the projected liquor sales taken from the actual purchases of liquor and beer were $112,161.00 while the reported liquor and beer sales for this period of time were only $54,351.35. The projected liquor sales for the said period are almost 100 per cent greater than the figures as submitted and there is no way that such a discrepancy can be explained away by the operation of a "happy hour", the provision of free drinks to patrons and spillage.

The Tribunal, therefore, finds that the Licensee had not met the requirements of Section 9(6) of Regulation No. 581 of the Liquor Licence Act. The Tribunal, therefore, confirms the Decision of the Liquor Licence Board dated the 1st day of December, 1983 and the Tribunal directs the Board to set the date of commencement of the said "TERM AND CONDITION".

HARON INVESTMENTS INC. operating as
CANADIAN FINANCIAL SERVICES and
NICOLAS NICOLAIDES to operate as
CANADIAN FINANCIAL SERVICES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO RENEW REGISTRATION AND
TO REFUSE REGISTRATION, respectively

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
ERIC EXTON, MEMBER

COUNSEL: GARY J. SMITH, Q.C., representing the Appellants

A.N. MAJAINA AND
STEPHEN P. MARTIN, representing the Respondent

DATES OF HEARING: 16th, 17th, 18th, 19th, 23rd, 24th August 1983
6th, 7th, 8th, 12th, 13th, 14th, 15th, 16th, 26th September 1983
24th, 25th, 28th, 29th, 30th, November 1983
1st, 2nd, 6th, 7th, 9th December 1983

REASONS FOR DECISION AND ORDER

Nicolas Nicolaides, (Nicolaides - Applicant) to carry on business under the business name or style of Canadian Financial Services, was first registered as a mortgage broker, effective August 14, 1974 and he remained registered as such mortgage broker until June, 1976.

Haron Investments Inc., (Haron - Registrant) is a corporation incorporated under the Business Corporations Act, R.S.O. Nicolaides was its incorporator and he has been its only director and officer ever since the date of its incorporation on February 13, 1976. Haron to carry on business under the business name or style of Canadian Financial Services, was first granted registration as a mortgage broker under the Act with effect from June 1976 and it is still so registered.

Haron made applications for renewal of its registration in 1981 and 1983 but the Registrar has not granted renewal. By reason of, and subject to section 7(8)(b) of the Act, the registration of Haron "shall be deemed to continue" and, accordingly, the registration of Haron has continued and Haron has carried on business to date.

Nicolaides made an application, dated January 14, 1982, again for the sole proprietorship registration in the name of Nicolaides, to carry on business under the name or style of Canadian Financial Services. The Registrar has withheld the granting of registration to Nicolaides. The latter application was as a result of an aborted surrender of the registration of Haron. A business registration form, in the name of Nicolaides himself, to carry on business under the trade name or style of Canadian Financial Services, with effect from May 20, 1982, was filed with the Companies Division of the Ministry to support the application for registration in this name, as aforesaid.

The two applications are outstanding.

The Tribunal is of the opinion that Nicolaides is the alter ego of Haron and that in respect of the mortgage business the actions of one are the actions of the other.

The business is primarily introduction oriented, that is to say that borrowers who require funds but who do not have access to lenders, come to Canadian Financial Services for assistance. The industry itself is classified into three types: those brokers who perform this introductory function, those that syndicate funds, and those that act as conduits for the receipt of mortgage payments. Canadian Financial Services fits into the first group and appears to be one of the large ones of that type.

Mesto Accurate Appraisals Ltd. (Mesto) was incorporated on 8th January 1978 and Nicolaides was the sole director and officer thereof until June 15, 1981 when one James J. George (George) a certified A.A.C.I., theretofore an employee of Mesto became sole director and officer. Mesto had never been registered as a mortgage broker under the Mortgage Brokers Act. Mesto carried on business from Suite 607, 74 Victoria Street which was also the business address of Canadian Financial Services.

Nicolaides operating as Northland Pheasant Farms (Northland) had never been registered as a mortgage broker under the Mortgage Brokers Act.

HARON - Notice of Proposal

On the 17th March 1983, the Registrar issued a Notice of Proposal to refuse to renew the registration of the Registrant, Haron carrying on business under the firm name or style of Services, for the following reasons:

[Past Conduct]

(1)...that the past conduct of its officer or director, namely, of Nicolas Nicolaides, affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, within the meaning and contemplation of section 5(1)(c)(ii) of the Act.

[Contravention of Act and Regulations]

(2)...that it is carrying on activities that are, or will be, if it remains registered,in contravention of this Act or the regulations, within the meaning and contemplation of section 5(1)(d) of the Act.

[Breach of Term and Condition]

(3)...that it is in breach of a term or condition of the registration within the meaning and contemplation of section 6(2) of the Act.

[Financial Position]

(4)...that, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, within the meaning and contemplation of section 5(1)(c)(i) of the Act.

NICOLAIDES - Notice of Proposal

The Registrar therein proposed further to refuse to register the Applicant, Nicolaides, to carry on business under the firm name or style of Canadian Financial Services" for the following reasons:

> [Past Conduct]
>
> (6)"...that his past conduct ....affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 5(1)(b) of the Act.
>
> [Financial Position]
>
> (5)"...that, having regard to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 5(1)(a) of the Act."

The Registrar set out lengthy and detailed particulars of complaints of certain complainants-borrowers who dealt with Haron (through Nicolaides) and particulars of inquiries made and inspections carried out by Ministry officials, as the basis of the reasons. Further particulars were added in the course of the hearing. Further details were placed in evidence before the Tribunal orally and by documentation.

PARTICULARS - Notice of Proposals

[Regulation-re Trust Funds]
The Registrar has alleged contraventions of the Regulation related to the handling of monies by Haron.

Deposit - Disbursement
Regulation 662 under the Mortgage Brokers Act provides under the heading Trust Funds,

> Section 6 (inter alia):
> (1) All funds received by a mortgage broker in connection with a mortgage transaction other than those which are clearly made as payment for fees earned shall be deemed to be trust funds.
>
> ....
>
> (4) All trust funds received by the broker whether by cash, cheque or otherwise shall be deposited in the mortgage broker's trust account within two banking days of their receipt.
>
> ....
>
> (6) No mortgage broker shall disburse any monies held in trust, or any part thereof, except in accordance with the terms and conditions upon which the monies were received.
>
> (7) Nothing in this section shall be construed as affecting the right to any remedy available in law to the mortgage broker or any other person having a lawful claim to the monies held in the trust account referred in in subsection (2).

[emphasis above and below Tribunal's]

The only exception to the description of trust funds is in respect of those which are clearly made as payment for fees earned.

The creation of the exception is a matter for the parties during the course of their dealings. That the affected party has acceded in writing to the description of fees as "earned" (especially coupled with the word 'non-refundable) is a factor which the Registrant can act on accordingly, unless such description was obtained fraudulently (by artifice, deception, etc.) The Tribunal finds that such agreement requesting a non refundable and fully earned fee is not a waiver of any statutory requirement.

The present Registrar is of the opinion that the fee is payable only when the "indenture is executed" and the disbursement of the borrowed funds is to take place to the borrower and (if part of the agreement includes payment of the fee therefrom) to the broker; if in such instance the monies for the fees are already in the hands of the registrant they thereupon become payable, i.e. earned. That opinion was acknowledged by the present Registrar to be at variance with a direction of an earlier Registrar set out in a letter dated 1 May 1979 (Exhibit 19A). The Tribunal's notes that the above is an example of a difference of interpretation, and further that it is likely that disagreement could be had with both opinions in that no generalization can have total validity because a decision must be made in each individual situation.

However, if a Registrant acts upon his conclusion that the payment is considered to be an exception, or makes a disbursement in accordance with the terms and conditions as viewed by him, and subsequently it is determined by the proper authority otherwise, the Registrant is running the risk of consequences flowing from the contravention that had taken place.

The Tribunal notes that in the Mortgage Brokers Act there is no prohibition in respect of the taking of monies related to fees except as found in Regulation Section 3 (a term and condition):

> (1) Where the principal amount of the mortgage is to be $40,000 or less, no mortgage broker shall accept an advance payment or deposit, or induce or attempt to induce any person to make an advance payment or deposit for services to be rendered or expenses to be incurred.

(In effect since 1971, 11 years after enactment of statute.)

The Tribunal discerned a concept on behalf of the Registrar that the taking of money by Haron in advance in respect of even the large mortgages applied for , was not proper because it placed a 'ransom' in the hands of Haron, and that the Tribunal should consider the inflation that has taken place in the interim. The opinion of the Registrar appears to be that mortgage brokers should not be permitted under any circumstances to accept a deposit prior to the advance of funds. This would mean that the Registrar's position is that "borrower must never be in the position (of being forced) to sue"; if the borrower shops the deal elsewhere or does not wish to pay the broker at all, the broker should only have recourse to the courts.

The Tribunal takes cognizance of a comparable piece of consumer legislation - the Real Estate and Business Brokers Act. Deposits are the invariable rule. The purchaser is often subjected to the necessity of suing to establish his right to return of the deposit for it is not required of the vendor to sue to establish entitlement to the deposit. And the matter of entitlement to a commission is the basis of the agreement between the vendor and the agent, which agreement may vary from situation to situation. Though the comparison can have no bearing on the findings in this matter, the comparison is indicative that the concept expressed by the Registrar is not of general application.

As to Registrar's proposition that a mortgage broker must not be allowed any deposit with any application regardless of the amount involved, the Tribunal is of the opinion the intent of the legislation was never to prohibit knowledgeable (as opposed to uninitiated) applicants involved with substantial amounts of money from making deposits but rather to protect the ordinary citizens from unscrupulous operators. The Legislature has set not the foregoing subjective assessment but the 'objective' criterion - $40,000.

The Registrar's concept is one to be expressed to the responsible authority and acted upon by change in statute or regulation if seen fit; until such time it is Reg. Sec. 3(1) that is the restriction to be applied.

The Tribunal is of the opinion that in those instances where payment was made for fees and listed as being "non-refundable and earned' (i.e. within the exception) there is no contravention by Haron of trust provisions for the purposes of these proceedings.

The Tribunal finds:

(1) that there were instances where the monies paid in respect of fees did not come within the exception and were not deposited in the Trust Account and

(2) there were instances when monies were disbursed not in accordance with terms and conditions received.

Records inspection indicated shortages in the Trust account (unidentifiable as to borrower) which were attended to upon awareness.

Accordingly the Tribunal finds they were at least four such contraventions of the Regulations re Trust Funds by Haron.

Designation of Account

Reg. Section 6 provides:

> (2) Every mortgage broker shall maintain in respect of all funds that come into his hands in trust a separate trust account....designated as "The Mortgage Brokers Act Trust Account"...

The Tribunal finds during Haron's registration inexact compliance with the Regulation 6(2) as to the designation of the trust account and therefore contravention. Compliance was ultimately achieved.

Under the specific circumstances of these instances above viewed individually and in the totality of Haron's operation since registration, both as to number of applications (100's of transactions since 1974, in respect of which there were no complaints brought to the attention of the Registrar) and dollar value of business, the Tribunal is of the opinion that the nature of the above contraventions of the regulations respecting Trust Funds do not call for a disentitlement to registration.

The Tribunal notes with regard to the trust-account action and trust account designation by Haron that no client's money was at risk or misused though such lack, or non-injury to any consumer does not excuse the blameworthiness of the actions.

The Tribunal does express its views that the "trust fund" operations of a Registrant is of the utmost significance and the least sign of deliberate action in contravention of section 6 is a most serious matter.

[Regulation - re Books and Records]

Section (7) provides:

> (1) Every mortgage broker shall keep proper records and books of account showing monies received and monies paid out and such books shall include a receipts journal, disbursements journal, general journal, general ledger, clients' ledger and such additional records as the Registrar may require, in accordance with accepted principles of double entry bookkeeping and shall have the books of account and financial transactions audited annually by a person licensed under the Public Accountancy Act.

As a result of inspections conducted by the Registrar, there was placed in evidence the situation as to the Books and Records of Haron in respect of the requirement of Regulation.

The Tribunal is of the opinion that the keeping of books by Haron fell far short of the meticulousness which should be the standard to be striven for in the dealing with other people's money. Difficulties in analysing the books and records were compounded by the intermingling of those accounts with the affairs of Northland.

The Tribunal is of the opinion that the discrepancy between the books and records kept and the requirements of Section 7(1) does not constitute such a contravention of the Regulation as to be the basis of disentitlement to registration.

The Tribunal emphasizes that a high standard of the keeping of accounts is to be expected of registrants. They should be such as to render an easy and ready evaluation; it should not be necessary for time, effort and continuous monitoring by the Registrar to determine whether the Regulation is being complied with.

[Term and Condition - re Audited Statement]

Reg. Section 3 (Terms and Conditions) provides:

> (6) Where the registrant is a corporation, a copy of the most recent audited financial statement....shall be filed with the Registrar on or before the 30th day of June in each year.

The statement as required has not been yet filed. Regardless of what the Registrar accepted in past years, Haron has been given more than ample time for compliance.

The Tribunal finds that Haron has been and continues to be in breach of the term and condition set out in Regulation Section 3.

[Term and Condition - re Mortgage Statement]

Reg. Section 3 (Terms and Conditions) provides:

> (10) Every mortgage broker shall deliver to each borrower a statement of mortgage in Form 2 together with a copy of the borrower's application where the borrower has completed an application at least twenty-four hours before the borrower is asked to sign the mortgage documents.

Delivery of Statement

This term and condition which is clearly a significant consumer provision, has accordingly received great stress by the Registrar in the regulation of the conduct of those employed in the mortgage business.

The evidence placed before the Tribunal in support of the Registrar's Proposal indicates that the thrust of the Notice of Proposal is based on an allegation of breach of the term and condition of this Reg. Section 3(10).

The nature of the term, and the form emanating therefrom, and the time element therein, express an emphasis by the Legislature on a disclosure procedure to ensure that the consumer is aware of the terms of the charge which will be on him, and to allow him time to consider before he is asked to sign that charge and to ensure that the provision which he agrees to is what is to be binding on his realty.

The Registrar has in his concept of the protection of public interest placed his interpretation on Reg. Section 3(10); Nicolaides (for Haron) by reason of the course of action believed by him necesssary for a continuing and viable business has his interpretation. The two interpretations are completely at odds and go to the very basis of all the main allegations of impropriety under the various provisions of the Act and Regulations set out in the Notice of Proposal.

The Registrar is of the opinion that "mortgage documents" are inclusive of all documents leading to the mortgage instrument; the interpretation was expressed in a letter (Exhibit 7H) on 29th September 1975 to Nicolaides from Decelles (an inspector) on behalf of (then) Registrar Simone - "The key words here are "mortgage documents" which the Registrar has ruled include the application form, the statement of Mortgage form, the commitment agreement, etc., leading up to and including the mortgage instrument itself."

The Tribunal notes that this Ruling (i.e. interpretation) is made in a "private and confidential" letter to the registrant. Accepting the fact that there is no obligation for a Registrar to do so, it could be useful for such a 'ruling' to be made generally and publicly even though such action would lend no additional validity to the ruling, for the interpretation is subject to ultimate appellate determination.

Haron has utilized forms variously described as "Mortgage Application Agreement", "Standby Fee Agreement", "Approval of Mortgage Loan" which in some instances it is noted (and in some instances the Statement of Mortgage) contain the following words: "fully earned and non-refundable fee", and which were signed (unilaterally in some instances by the borrower) less than 24 hours before or, simultaneously, with the Statement of Mortgage.

The Registrar's interpretation was applied to Nicolaides' Mortgage Application form, Haron's "Mortgage Application Agreement", Haron's Standby-Fee Agreement, Haron's "Statement of Mortgage", a committment agreement issued by an institutional lender, Haron's Approval of Mortgage Loan".

The Registrar's office has not deviated from that interpretation (ruling); indeed it has firmed such position. Only at the hearing, was a qualification made known - that "mortgage documents" included such preliminary documents as imposed any obligation on the borrower (inclusive of the above clause). Reference was made in this context to the designation "non-binding".

The Registrar's interpretation, if correct, would place the registrant Haron of having been in regular breach of the term.

Nicolaides took the position that "The statement of mortgage is required to be executed 24 hours before the mortgage instrument (the Tribunal is of the belief that Nicolaides had particularly in mind the commercially used mortgage form and supporting affidavits) is executed by the mortgagor (i.e. "mortgage documents mean mortgage instruments". His procedures reflected the position - he would get preliminary documents signed without relation to Form 2 and continued to relate the time and delivery of Form 2 to the execution of the mortgage instrument itself.

The Tribunal is of the opinion that Section 3(10) is lacking in the clarity which should be expected of a provision which sets down a procedure equivalent to a code of conduct, non-compliance with which would lead to the loss of entitlement to the registration enabling one to earn a livehood in this particular business.

What indeed is meant by "mortgage documents"?

The Mortgage Brokers Act
states in the interpretation section:

> (1) In this Act,
> (f) "mortgage" has the same meaning as in the Mortgages Act;

The Mortgages Act (R.S.O. 1980, C. 296)
states in the interpretation section:

> (1) In this Act,
> (d) "mortgage" includes any charge of any property for securing money or money's worth"

The Real Estate and Business Brokers Act (R.S.O. 1980, C. 431)
provides

"

> Schedule
>
> GLOSSARY
>
> The following words and phrases are frequently used in respect of real estate transactions. The definition given pertains to the real estate meaning. The word "property" refers to real property.
>
> 37. Mortgage A conveyance of property to a creditor as security for payment of a debt with a right of redemption at a specified date. "

The form required to be delivered pursuant to Reg
Section 3(10) (Terms and Conditions) is set out below:

Form 2

Mortgage Brokers Act

STATEMENT OF MORTGAGE

This form must be completed in duplicate in accordance with the regulations under the Mortgage Brokers Act and a signed copy given to the borrower at least 24 hours before he is asked to sign any mortgage documents

[Details]

....
....
....
....
....
....
....
....

I ______________________ of ______________________
NAME ADDRESS

the Borrower under this proposed Mortgage, have read and fully understand the above Statement furnished me by ______________________
NAME AND ADDRESS OF BROKER

I have not yet signed any Mortgage Papers or Blank Documents on this mortgage and now sign this Statement in duplicate, which has been fully completed this ________ day of ______________ 19____ and I hereby acknowledge receipt of a fully completed signed copy.

____
Signature of Borrower

I ______________________ have fully completed the above Statement
NAME OF BROKER

in duplicate and have furnished one signed copy to the Borrower on the above date.

____
Signature of Broker

R.R.O. 1980, Reg. 662, Form 2.

The Tribunal notes that the 'instruction' note at the top of the form refers to 'a signed copy'. Query - signed by whom? By the Broker? by the borrower? by both? - why is it not specified? Why, contrary to common usage, is the broker's certificate (signature) below the other, if the broker is to sign first?

As to the certification statements at the bottom - the broker has

> "fully completed the above Statement in duplicate and have furnished one signed copy to the Borrower on the above date"

yet the Borrower refers to

> "statement...completed this...day...and I hereby acknowledge receipt of a fully completed signed copy."

The language suggests that the "above date" and this date" being the same, it cannot be delivered 24 hours before the borrower is asked to sign the mortgage documents if (as is claimed by the Registrar) the statement of mortgage is a "mortgage document".

The Tribunal notes that Form 2 includes the acknowledgement by the borrower:

> "I have not yet signed any mortgage papers or blank documents on this mortgage..."

What is the purpose and effect of such acknowledgment?

What is the significance of the change of expressions - mortgage documents to mortgage papers, mortgage documents to blank documents.

The Tribunal notes the further acknowledgment by the borrower:

> "I .... have read and fully understand the above statement..."

Surely it is to be expected that the borrower will apply the reading and understanding to everything above his signature - including the 'deviation' of the insertion of the non-refundable and fully earned fee clause.

Section 3(10) requires the delivery of a copy of the borrower's application, when the borrower has completed an application". The Registrar's interpretation would preclude a signature on an application form prior to receipt of a Form 2. This indeed would be inconsequent, and contrary to common usage.

There is no requirement for an application to be in writing. That a written application require 24 hours predelivery of a statement of mortgage, and an oral application need no such predelivery (patently impossible in any event) is inconsistent.

There is no prescribed waiting period between the signing of the application and the delivery of the Statement of Mortgage and there is no reason why the execution of the application and delivery of the Statement of Mortgage could not be done simultaneously. The section expressly contemplates the possibility of a borrowers "application", and it is the Tribunal's opinion that the term "mortgage document" does not also include such application.

Accordingly, the Tribunal is of the opinion that there is nothing in the Morgage Brokers' Act which would prevent delivery of a Statement of Mortgage to a borrower at the same time as he is asked to sign a 'binding' loan application. Whether or not a deposit is given at the time of signing the application is of no consequence. There is no requirement as to the order of execution of preliminary documents; the requirement is that of delivery of a statement of mortgage at least 24 hours prior to the asking for the signing of the mortgage document (i.e. instrument).

The whole procedure leading up to that could be oral; monies could be passed by the borrower to the broker without any restriction (mortgage over $40,000) under the Act. The Tribunal notes that there is no requirement as to the delivery of a commitment, signed or not by one or more of the parties.

The Tribunal notes in the case of Bonneville et al v. Temelini & Zito et al (1982) 21 R.P.R. 206, being a decision of Griffiths J. of the Ontario Supreme Court who stated at pages 213-214 thus:

> Now, here we have the additional complication that the provisions of the Mortgage Brokers Act, R.S.O., 1970, c. 278, requiring the mortgage statement to be given 24 hours in advance of signing was not complied with. The statements of mortgage (Ex. 2) were signed within minutes of the execution of the mortgage. Obviously, the Legislature in enacting the provisions of the Mortgage Brokers Act had in mind or contemplated that the borrower should have some time in which to examine the terms of the mortgage and the fees that he is to be charged, and to raise any questions with respect thereto. In this case, I accept the plaintiff's evidence that within a matter of five to ten minuters after the statement of mortgage were presented to him, he was asked to sign the mortgage without any real explanation being given."

The Tribunal is of the opinion that it is this practice that was legislated against.

The Tribunal finds that "mortgage documents" is the mortgage instrument, i.e. the document which is "a conveyance of property to a creditor as security for payment of a debt with a right of redemption at a specified date." "Mortgage documents" do not include any documents which cannot have the legal effect as above described.

Accordingly the Tribunal finds that the preliminary documents referred to by the Registrar - application, statement of mortgage, committment, are not mortgage documents. Such documents used by Haron are accordingly not mortgage documents.

Form of Statement

It has been submitted by the Registrar that any addition to Form 2 and in particular Haron's addition(s) vitiates it as a form that will comply with Regulation Section 3(10).

The Tribunal is of the opinion that the words "fully earned non-refundable fees" is not a deviation from Form 2 "affecting the substance or calculated to mislead"

Accordingly, since no contrary intention appears in the Mortgage Brokers Act, the deviation does not by such insertion vitiate it.

The Tribunal finds that in no instance (where evidence was placed before the Tribunal) was there the asking of a borrower by Haron that he sign or the signing of a mortgage document (as interpreted by the Tribunal) with a statement of mortgage complying with Form 2 having been delivered less than 24 hours prior thereto.

There are those in the mortgage business (banks, loan and trust companies) who do not come under the Act and accordingly do not have to provide a statement of mortgage form, and who would not presumably be curtailed in taking standby fees or good faith deposits (which are deposited in general accounts) and which upon default of the borrower are retained as liquidated damage and to pay legal expenses. The Tribunal is of the opinion that any restrictions which are not applicable equally should not be broadened by interpretation beyond the clear provisions of the Act.

[Past Conduct]

The Mortgage Brokers Act is consumer legislation - designed to provide certain protection to the borrowers of mortgage funds, and the industry is regulated for that purpose. The entitlement to registration provisions and the restriction of action by the Registrar in respect of registration, and the hearing procedures provided are clear indications that the mortgage broker is not without certain rights.

The Tribunal is mindful of the dictum of Chief Justice Robertson in Re Securities Act and Morton [1946] O.R. 492. At p. 494, he said:

> "The Commission is to suspend or cancel a registration, where, in its opinion, such action is in the public interest: s. 10. A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the

> business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining the public interest that is to be served by the Commission, and not private interests or the interests of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman.

The Tribunal is of the opinion that the Act does not interfere (subject to statute restriction, e.g. Reg. 3(11) with contractual relationships as may be created between a borrower and a broker.

The Tribunal finds that the incidents involving the complainants - borrowers, where complaints were put in evidence, were extraordinary, resulting in strong antagonism between the disappointed borrowers and Nicolaides. Notwithstanding there have been these recent complaints, Nicolaides has been 'in business' since 1974 and has completed a great number of transactions without any complaints being brought to the attention of the Registrar. The Tribunal finds that Nicolaides seems to be a broker of last resort; he appears to be a hard-nosed business man but he seems to provide a service to people by obtaining mortgage funds which, in many cases, may not be available to them otherwise. The Tribunal notes that some 'complainants' continued to do business with Haron. It is not Nicolaides behaviour in business which is the consideration of the Tribunal; it is whether he has carried on business within the provisions of the Act and Regulations.

The Tribunal finds upon a review of all the mass of detail placed before it that the past conduct of Nicolaides does not afford reasonable grounds for belief that business will not be carried on in accordance with law (the Tribunal agreeing with the interpretation of Nicolaides) and with integrity and honesty.

[Financial Responsibility]

The Tribunal had placed before it in various forms the financial position of Haron and Nicolaides. As to assets and liabilities, the Tribunal is of the opinion that each can be expected to be financially responsible in the conduct of business.

[GENERAL]

The Tribunal finds that there is no sufficient evidence in respect of all the matters placed before the Tribunal, of other action in the past of Haron or Nicolaides and not specifically referred to herein which would provide a basis for action by the Registrar under Section 6.

THE TRIBUNAL FINDS -

in regard to Haron:

1. that the past conduct of its officer and director, namely Nicolaides does not afford reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;

2. that it is not carrying on activities that are, or will be, if it remains registered in contravention of Regulations with respect to 'trust funds' Reg. 6(1)(2)(6) and books of records Reg. 7(1);

3(a) that it is in breach of a term or condition of the registration with respect to filing of an audited financial statement as required by Reg. Sec. 3(6);

(b) that it is not in breach of a term and condition with respect to the delivery of a statement of mortgage;

4. that, having regard to its financial position, it can reasonably be expected to be financially responsible in the conduct of its business;

in regard to Nicolaides:

6. that his past conduct does not afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, and

5. that, having regard to his financial position, he can reasonably be expected to be financially responsible in the conduct of his business.

In the above matters where it does not find the allegations in the Notice of Proposal supported, the Tribunal substitutes its opinion for the Registrar's.

The Tribunal directs the Registrar:

(1) To carry out his Proposal to refuse to renew the registration of Haron [because of breach of the term and condition Reg. Sec. 3(6)];

(2) Not to carry out his Proposal to refuse to grant a registration to Nicolaides (to carry on business as Canadian Financial Services);

(3) To grant registration to Nicolaides on the terms and conditions set out herein.

And the Tribunal considers it proper to attach the following terms and conditions to its Order:

1. Haron may continue business to the 31st January 1985 provided it does so in accordance with its undertakings given upon the granting of the adjournment of the hearing by the Tribunal and continued after the concluding of the oral part thereof; if breach of this condition occurs the Order with respect to the Notice of Proposal re Haron shall be in effect thereupon.

2. The Order as to registration of Nicolaides to be effective 31st January, 1985, subject to Nicolaides prior thereto:

(a) having filed an immediate statement of assets and liabilities in accordance with the general accepted practice of persons licenced under the Public Accountancy Act as will demonstrate that he can reasonably be expected to be financially responsible in the conduct of his business as generally accepted by the Registrar;

(b) having set up a system of records and books of account in accordance with Section 7 (inclusive of one "pure" trust account and one "pure" general account, each properly designated) capable of providing a meticulous compliance pursuant to Reg. Sec. 7(1) and certified as such by a person licenced under the Public Accountancy Act;

(c) having paid all outstanding liabilities of Haron and Nicolaides or evidence placed before the Registrar that a satisfactory settlement has been made with respect to each of them;

otherwise this Order shall lapse.

3. The Registrar may on application, delete or reduce any term and condition attached to the registration;

4. The Order is subject to any change in Regulation 662;

5. If the Decision and Order is appealed, the effective date herein shall be not 31st January 1985, but the date six weeks following the appeal being concluded.

and the following terms and conditions to the registration and renewal thereof to the 31st January 1987:

1. In the cases where it is patently obvious that no funds can be obtained, (e.g. where the borrower does not have the funds to meet the cost requirements of prospective lenders) the borrower is to be told so immediately without application or deposit being taken.

2. Regulation prescribed form(s) be in no way amended or altered and that the words "non refundable and fully earned fee (deposit)" or like words be eliminated from all documentation except as to a separate acknowledgement by the borrower as to this single item, and unless the said acknowledgment contains in addition the clause that it is being given "as a general retainer for which Nicolaides is not obligated either to account or to render services" and which document is delivered to the borrower 24 hours before the borrower signs it and gives such deposit.

3. Any deposits must not exceed 1% of the application.

4. Subject to paragraph 2, all funds received by the broker whether by cash, cheque or otherwise shall be deposited in the mortgage broker's trust account in accordance with the regulation.

5. An obligation should be executed by Mrs. Nicolaides for any default arising out of non-compliance with trust fund regulations or of paragraph 4 hereof if any of the assets in the statement of assets and liabilities of Nicolaides are owned by Mrs. Nicolaides or if she has any interest therein, or a Bond provided in the amount of $25,000 or in the amount of the greatest amount in Canadian Financial Services trust account during the previous year, whichever is the greater.

6. In the event a commitment is not received within 15 business days of an application, a deposit paid is to be returned to the borrower (by certified cheque) without deductions except as to borrower directed payments to third parties for services incurred in the process of arranging of the mortgage and rendered in fact.

7. No commitment be issued by Nicolaides on his own account unless he has first placed such funds in his lawyer's trust account (which may be segregated and interest bearing) to be delivered in accordance with the commitment.

8. (a) No funds may be transferred from the trust account until after the mortgage transaction has actually been completed and funds received by the borrower in accordance with the terms of the agreement, or after the borrower has been given 15 days' notice that a transfer is to be made pursuant to the agreement;

(b) Upon the issuance of a writ by any borrower against Nicolaides for a return of any fees paid to him in respect of an application, Nicolaides will deposit immediately in his Trust Account monies sufficient to cover the said fees and maintain them therein so long as the proceedings are processed in the ordinary course.

9. (a) The books and records of Nicolaides shall be under the continuous supervision of a person licenced under the Public Accountancy Act.

(b) A certificate of audit of a person licenced under the Public Accountancy Act that compliance has been had with Reg. Sec. 7(1) and a copy of the most recent financial statement including an updated statement of the personal assets and liabilities of Nicolaides shall be filed with the Registrar on or before the 30th day of June 1985 and every 6 months thereafter.

10. Any complaint in writing received by Nicolaides in respect of the business as a mortgage broker to be forwarded to the Registrar forthwith upon receipt.

11. Any complaint forwarded by the Registrar to Nicolaides shall be replied to fully within two business days after receipt thereof. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

JERRY O. BABROCIAK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE REGISTRATION AS
MOTOR VECHICLE SALESMAN

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
J.T. HOGAN, MEMBER

COUNSEL: STEPHEN AUSTIN, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 21st March, 1984.

REASONS FOR DECISION AND ORDER

The Tribunal finds that the registrant Jerry O. Babrociak did execute certain documents which he knew were false, which were used as the basis for fraudulently obtaining from American Motors (Canada) Limited certain sums of money where there was no entitlement.

The Tribunal finds the registrant Jerry O. Babrociak was one of the participants in a general scheme for such fraudulent action and that he did conspire with others in respect of such a scheme. Details with respect to the above are set out in Exhibits 11, 12, 13, 14, 15, 16 17, 18, 19 and 20.

The Tribunal finds that the "past conduct" of the registrant "affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

Accordingly the Tribunal by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act directs the Registrar to carry out his Proposal.

GEORGE P. CADAS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
KEITH COULTER, MEMBER

COUNSEL: STEPHEN AUSTIN, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 19th April 1984

REASONS FOR DECISION AND ORDER

The Appellant, George P. Cadas, appealed to the Tribunal from a proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse him registration as a motor vehicle dealer. The Appellant failed to appear at this hearing which was convened at his request although duly served with notice of the same as appears from the Proof of Service filed.

Section 7 of the Statutory Powers Procedure Act provides that:

> Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings.

The Notice duly served upon the Appellant as aforesaid included a notice as to the provisions of the said section 7 of the Statutory Powers Procedure Act in accordance with which the hearing proceeded in the Appellant's absence.

Section 6(1) of the Motor Vehicle Dealers Act provides that:

> Subject to section 7, the Registrar may refuse to register an Applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 5(1)(b) of the said Motor Vehicle Dealers Act provides as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

Section 7(1) of the said Motor Vehicle Dealers Act provides that

> Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his Proposal together with written reasons therefor on the applicant or registrant.

The Tribunal holds that this provision has been fully complied with as aforesaid.

The Tribunal has heard the testimony of two members of the Intelligence Bureau of the Metro Toronto Police Force. The Respondent Registrar has proved to our satisfaction that on June 13th, 1983, the Appellant pleaded guilty to the charge of conspiracy to possess property obtained by crime before his Honour County Court Judge Trotter and was sentenced to a term of 90 days intermittent and ordered to pay restitution in the amount of $1,500.00.

This conviction and the crime or crimes to which it relates are serious in the extreme. In the Tribunal's opinion the criminal wrong-doing involved strongly implies a propensity - at least at the time the crimes were committed - for systematic and ruthless dishonesty and a criminal disposition on the part of the Appellant which would render him quite unfit to operate as any kind of registrant under the Motor Vehicle Dealers Act, especially as a Dealer where even greater opportunies would be offered for criminal activity than in the case of the somewhat lesser responsibilities given to the holder of a Salesman's registration.

The Tribunal agrees with the Registrar's conclusion that the past conduct of the applicant affords reasonable ground for belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal, upon the evidence, reaches the identical conclusion.

In the course of his judgment upon the judicial review of the Tribunal's decision in the case of Sunparlour Motor Sales which was reported at p. 7 of Vol. 9 of the Reports of the decisions of this Tribunal for the year 1980, the Honourable Mr. Justice Peter Cory sitting as a member of the Divisional Court of Ontario stated in part that "...when assessing the probable future actions of men some reliance may properly be placed on the past acts of the individual to be assessed."

In the present case the past acts of Mr. Cadas strongly suggest that he is unfit for the registration sought and the Tribunal therefore holds that the Registrar's decision must be upheld, at least until such time as the Appellant has clearly demonstrated, over a substantial period of time, that his character has thoroughly reformed (if that is possible) whereupon an application in accordance with Section 8 of the Motor Vehicle Dealers Act might be considered.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

JAMES A. EDIE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
ROSS WEMP, MEMBER

COUNSEL: STEPHEN AUSTIN, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 30th April 1984

REASONS FOR DECISION AND ORDER

The Appellant, James A. Edie, appealed to the Tribunal from a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse him registration as a motor vehicle salesman. The Appellant failed to appear at this hearing which was convened at his request although duly served with notice of the same as appears from the Proof of Service filed.

Section 7 of the Statutory Powers Procedure Act provides that:

> Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings.

The Notice duly served upon the Appellant as aforesaid included a notice as to the provisions of the said section 7 of the Statutory Powers Procedure Act in accordance with which the hearing proceeded in the Appellant's absence.

Section 6(1) of the Motor Vehicle Dealers Act provides that:

> Subject to section 7, the Registrar may refuse to register an Applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 5(1)(b) of the said Motor Vehicle Dealers Act provides as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

Section 7(1) of the said Motor Vehicle Dealers Act provides that:

> Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his Proposal together with written reasons therefor on the applicant or registrant.

The Tribunal holds that this provision has been fully complied with as aforesaid.

The Tribunal has heard the testimony of Inspector William Roland Pugh and of the Registrar Mr. Abrams himself which verified the allegations set forth in the Notice of Proposal and specifically the Reasons and Particulars of the Reasons set forth in the Proposal at paragraphs B and C thereof which read as follows:

> B. REASONS
>
> In my opinion the Applicant is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

C. PARTICULARS

In concluding that the Applicant is not entitled to registration, I have taken into account the following facts:

(1) It is alleged that the Applicant has an extensive criminal record;

(2) It is alleged that the Applicant furnished false information on his application for registration by failing to provide the Registrar with full particulars regarding his criminal record;

(3) In response to question 7 on the Application for Registration dated the 28th day of October, 1983, the Applicant indicated that he had been convicted. In response to the instruction contained in question 7 which requested full particulars of all such convictions, on a separate sheet, the Applicant appended a note to the application which stated, inter alia, "...I have been charged and convicted under the criminal code of Canda, with assalt (sic). I have never been charged with any theft or robbery charges...." (Registrar's emphasis)

(4) In fact, the Applicant has an extensive criminal record which is as follows:

(a) convicted January 16, 1969, BE and Theft contrary to Section 292(1)(b) CC (3 charges), and sentenced to 2 years probation on each charge;

(b) convicted July 24, 1974, Mischief, and received conditional discharge for 1 year;

(c) convicted October 4, 1974, of Mischief and Fail to Attend Court, for which he was fined $200 and $100 respectively;

(d) convicted March 12, 1975, Assault CBH contrary to Section 245(2) CC, for which he received a suspended sentence and probation for 12 months;

(e) convicted December 1, 1975, Fraudulently Obtain Accommodation contrary to Section 322(1) CC, for which he was sentenced to 30 days;

(f) convicted February 1, 1978, Assault CBH contrary to Section 245(2) CC, for which he was fined $300;

(g) convicted September 9, 1978, Common Assault contrary to Section 245(1) CC and Mischief contrary to Section 387(1) CC, for which he was fined $300 and $50 respectively;

(h) convicted April 11, 1979, Break and Enter Contrary to Section 306 CC, sentenced to 6 months in jail;

(i) convicted June 29, 1983, BE and Commit contrary to Section 306(1)(b) CC, for which he was sentenced to 6 months in jail.

(5) The Applicant was paroled on August 30, 1983, which parole is still valid and subsisting.

(6) On the 14th day of December, 1983 the Applicant attended a meeting at the office of the Registrar at which time the Applicant's non-disclosure of his criminal record on the Application for Registration was discussed. The Applicant admitted to all of his convictions.

(7) Further, the Applicant also admitted that he has sold automobiles for Nethercott Chev Olds Limited as an unregistered salesman.

The Tribunal holds that each and all of the above particulars have been proven. The Tribunal particularly and especially disapproves of two matters disclosed by the evidence and which it holds to have been proven. Firstly, that in response to Question 7, on the Form of Application which reads in part,

> Have you ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet.

the Appellant furnished, by annexing it to the said form, a letter which reads in part:

> I have never been charged with theft or robbery charges.

In the light of the evidence, that assertion appears to be nothing other than an outright untruth.

Secondly, the Tribunal finds evidence that the Appellant was for approximately six weeks employed by Nethercott Chevrolet Oldsmobile Limited as a salesman while unregistered under the Act. It has been suggested that during the period in question (approximately for most of the month of November 1983 and the first half of December of that year) he was a mere "trainee" but the records of Nethercott Chevrolet

Oldsmobile Limited which were inspected by Mr. Pugh and set before the Tribunal and forming part of the subject matter of his testimony reveal that he was paid commissions for sales effected by him during that period and the Tribunal accepts as proven, that he was more than a trainee during the period, and was in fact unlawfully acting and being employed as a salesman contrary to the provisions of the Act.

The Tribunal holds that Section 3(1) of the Act (in particular) has been contravened which reads in part:

> No person shall,
>
> (a) act as a salesman of or on behalf of a motor vehicle dealer unless he is registered as a salesman of such dealer...

The Tribunal finds that the Appellant's criminal record (having regard to the convictions and the crimes to which they relate) is serious in the extreme. In the Tribunal's opinion the criminal wrong-doing involved strongly implies a propensity for dishonesty and a criminal disposition on the part of the Appellant which would render him quite unfit to operate as a registrant under the Motor Vehicle Dealers Act.

The Tribunal agrees with the Registrar's conclusion that the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. It agrees that Mr. Edie's past conduct strongly suggests that he is unfit for the registration sought. The Tribunal therefore holds that the Registrar's Proposal must be upheld.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

RONALD J. FAULKNER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
MURRAY FELDMAN, MEMBER

COUNSEL: DEREK T. HOGG, Q.C., appearing for the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 6th April 1984

REASONS FOR DECISION AND ORDER

The Appellant, Ronald J. Faulkner, appealed to the Tribunal from a proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse him registration as a motor vehicle salesman. The Appellant failed to appear in person at this hearing which was convened at his request although his solicitor of record had been duly served with notice of the same as appears from the Proof of Service filed.

Mr. Derek T. Hogg, Q.C., who had represented the Appellant during the course of certain preliminary correspondence with the Registrar of this Tribunal prior to the hearing and who was therefore the Appellant's solicitor of record at the time of the commencement of the hearing was present before the Tribunal at the commencement of the hearing. Mr. Hogg informed the Tribunal that he had been unable to obtain his client's instructions in respect of the hearing. He informed the Tribunal that he had made diligent efforts to do so and had failed due to no lack of effort or fault on his part. The Tribunal accepted that averment. Mr. Hogg then requested the Tribunal's leave to withdraw from the hearing of his client's appeal on the grounds that without instructions or briefing of any kind, he could not proceed, which leave was then granted by the Tribunal which could perceive no alternative open to it. However the Tribunal was and remains convinced that Mr. Hogg was the Appellant's solicitor of record at the time he was served with the Notice of Hearing as aforesaid and that such Notice was brought to the attention and knowledge of the Appellant (by his solicitor if not otherwise) and that, on top of that, the service of the said Notice was valid by operation of law.

Section 7 of the Statutory Powers Procedure Act provides that:

> Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings.

The Tribunal is fully satisfied that the said Notice was duly served upon the Appellant both in fact and by operation of law as aforesaid and that it included a notice as to the provisions of the said section 7 of the Statutory Powers Procedure Act in accordance with which the hearing therefore proceeded in the Appellant's absence.

Section 6(1) of the Motor Vehicle Dealers Act provides that:

> Subject to section 7, the Registrar may refuse to register an Applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 5(1)(b) of the said Motor Vehicle Dealers Act provides as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

Section 7(1) of the said Motor Vehicle Dealers Act provides that

> Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his Proposal together with written reasons therefor on the applicant or registrant.

The Tribunal holds that this provision also has been fully complied with.

The Respondent's objections to the Appellant, on which his refusal to grant him registration as a motor vehicle salesman was based, were set out in his Notice of Proposal to refuse registration and his Supplementary Proposal and Notice of Further Particulars. These included the following allegations:

> It is alleged that the Applicant has a record of convictions for criminal offences which relate to his fitness for registration under the Act.
>
> It is further alleged that the Applicant failed to fully disclose the details of his criminal record on his application for registration made the 3rd day of August, 1983.
>
> In addition to having been convicted of three charges of theft over $200.00, contrary to Section 294(a) of the Criminal Code, on the 30th day of April, 1982, the applicant was also convicted of three charges of uttering forged document, Section 326(1)(b) of the Criminal Code on the same date, for which the applicant received two years on each charge concurrently. The applicant was also convicted of assault causing bodily harm, contrary to Section 245(2) of the Criminal Code on the 16th day of October, 1980, for which he was fined $200.00.

The Applicant was an accredited member of the Law Society of Upper Canada, from 1973 to 1981. On or about the 19th day of June, 1981, the Applicant was disbarred for misappropriating clients' trust funds in excess of $41,000, failing to follow his clients' instructions, and failing to maintain sufficient funds in his trust account to meet his trust obligations to his clients. Such action by the Law Society of Upper Canada was directly related to his theft over $200.00 and uttering forged document charges.

In response to question 3 of the application for registration which provides "Provide particulars of occupation during past 3 years (including periods of unemployment, illness, etc.)", the Applicant failed to disclose that he had been incarcerated during the period commencing on or about the 30th day of April, 1982 and concluding on or about the 29th day of December, 1982.

On or about the 15th day of May, 1981, the Applicant made an Assignment into bankruptcy.

In or about the month of June, 1983, the Applicant received a formal discharge from bankruptcy.

It is alleged that the Applicant acted as a motor vehicle salesman of or on behalf of Grant Brown Motors Limited, a registered motor vehicle dealer, without being registered as a motor vehicle salesman of such dealer under the Motor Vehicle Dealers Act.

It is alleged that the Applicant acted as a unregistered motor vehicle salesman in 1983.

Each and every one of these allegations was proven to the Tribunal's satisfaction.

Exhibit 14 was a copy of "Communique" captioned a "brief informal report of the proceedings of the Benchers of the Law Society of Upper Canada in Convocation" dated 19th June 1981 and reading, in part, as follows:

> Ronald J. Faulkner of Ottawa was disbarred. He had misappropriated clients' trust funds in excess of $41,000, failed to follow his clients' instructions, and failed to maintain sufficient funds in his trust account to meet his trust obligations to clients.

The Tribunal was shown the following letter dated April 5, 1984 (the day before the hearing) which speaks for itself:

> HEWITT, HEWITT, NESBITT, REID
> BARRISTERS AND SOLICITORS
>
> OTTAWA
>
> April 5, 1984
>
> Stephen Austin, Esq.,
> Ministry of Consumer and Commercial Relations
> Toronto, Ontario,
>
> Dear Mr. Austin:
>
> Re Ronald J. Faulkner
>
> We wish to confirm the information given to you in connection with a claim against the above-noted.
>
> We represent the Royal Insurance Company, the insurers of Victoria & Grey Trust Company. These insurers have paid a loss as a result of the fraud of Faulkner in the amount of $35,000. We are under instructions to commence an action against Mr. Faulkner to recover this amount together with interest and costs. We have been delayed in pursuing the claim because we have been unable to locate Mr. Faulkner who allegedly resides at 174 Earle Street, Apartment 4, in Kingston but to date no one has been successful in locating him there.

> This will also confirm that the liability of Mr. Faulkner to reimburse our client in respect of this claim remains outstanding in spite of his discharge as a bankrupt because the liability arises out of a fraud in respect of which he has been conficted (sic) of a criminal offence.
>
> We trust that this is the information which you required.
>
> Yours very truly,
>
> "Adrian T. Hewitt"(signature)
> Adrian T. Hewitt
>
> ATH:BHC
> P.S.-Since the outset of this matter Faulkner has made no proposal whatsoever for payment of any amount against this liability.

The Tribunal was also shown certain documents related to the Appellant's bankruptcy including Minutes of First Meeting of Creditors and Lists of Creditors, including a "Schedule E" showing as "contingent and other liabilities" a list of twenty individuals and corporations - each marked, under the words "Nature of Liability", "Mortgage Guarantee". The "Amount of Liability or Claim" in each of these cases ranged from $5,000 to to $185,000 with the median amount appearing to be somewhere between $15,000 and $50,000. We repeat, there were twenty of these. And none of them appear to have resulted in any return to the claimants. In other words, a great deal of damage was inflicted on a substantial number of victims.

It seems to the Tribunal that if the words "past conduct of the applicant affords reasonable ground for belief that he will not carry on business in accordance with law and with integrity" have any meaning at all, that meaning would find itself more than abundantly illustrated by the facts of this case, and upon which it is hard to believe how any other conclusion could possibly be reached.

Exhibit 18 to these proceedings was a letter from the Appellant dated October 3, 1983 addressed to an official of the Ontario Government which reads as follows:

Dear Sir:

re: Right to Employment
National Parole Board
Recommendation
Opportunity to
Reassert Oneself

I ask your assistance, counsel and advice in obtaining the right to be employed in my province of Ontario.

In 1980 I experienced a business and social collapse resulting in court charges, an assignment in bankruptcy, a divorce and a conviction and incarceration at Kingston.

In 1981, I was disbarred by the Law Society of Upper Canada (Ontario).

Presently I am on parole until May, 1984.

I have had an opportunity to sell automobiles and did in fact sell cars with Grant Brown Pontiac, Buick, Cadillac, 247-7161, Toronto. I was a very successful salesman in the short term I was there at the dealership before Mr. Abrams, the Registrar of Motor Vehicles 963-0411, advised that it was his recommendation that my licence be denied.

I enclose two letters, one from my parole officer, the other from a John Howard Society counsellor.

Rehabilitation is a difficult matter; society generally, understandably has little sympathy for ex-offenders.

I would hope that the Province of Ontario would take a responsible position of leadership in providing the opportunity of employment to its citizens.

Yours truly,

R. Faulkner
26 Leopold Street,
Toronto,
M6K 1J9
534-7682

The fifth paragraph, "I have had an opportunity to sell automobiles...etc.", is of particular interest and concern to the Tribunal. The employment, with Grant Brown Motors Ltd. of Weston, Ontario, extended for about half a year and was contrary to law in that the Appellant had no commercial registration. The Investigator's Report and other evidence, including the sales records of Grant Brown Motors Ltd., suggest that the Appellant probably was a "very successful salesman" as he has alleged. But that is not the point. We understand there is a tradition that the devil is a very successful salesman, perhaps the best on record. But would it be "unfair" for Mr. Abrams to seek to deprive him of "his right to be employed"?

In this letter the Appellant hopes "...that the Province of Ontario [will] take a responsible (sic) position of leadership in providing the opportunity of employment to its citizens". The Tribunal gladly and eagerly adopts that pious hope and says that, for its part, it also hopes the Province through its servants and agents such as Mr. Abrams will continue to seek to protect consumers and the public in general, thereby seeking to continue to perform the responsibilities of leadership in that area as well, which is an area of supreme importance taking priority over all other considerations.

A lawyer who steals from his clients is one of the worst and most dangerous species of criminal. To borrow a phrase recently attributed to a Toronto judge he or she is "a true wolf". The record of the Appellant's past dishonesty reveals a systematized methodology which was both persistent and calculated. In the opinion of the Tribunal he is totally unfit for any kind of occupation giving scope to his demonstrated propensity for fraud, and specifically for the registration sought. The Registrar's misgivings and the Proposal which resulted from them must be absolutely upheld.

The Tribunal understands that the position of the Registered Dealer referred to in these Reasons has not yet been dealt with.

By virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

H & J AUTO CENTRE LIMITED operating as
TOWN AND COUNTRY AUTO CENTRE
HOWARD DILLON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE REGISTRATIONS

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WILLIAM J. GUIGNION, MEMBER

COUNSEL: PAUL L. MULLINS, representing the Appellant

MICHAEL BADER, representing the Respondent

DATES OF HEARING: 18th, 19th June, 1984 London

REASONS FOR DECISION AND ORDER

The Applicants have applied to the Tribunal for a hearing pursuant to Section 7(2) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299. On January 23, 1983, the Registrar of the said Act caused a Proposal to be served upon the Applicants to revoke the registration of Town and Country Auto Centre as motor vehicle dealer and the registration of Howard Dillon as motor vehicle salesman pursuant to the Motor Vehicle Dealers Act. In the Proposal the Registrar indicated that the past conduct of its officer and director Howard Dillon afforded reasonable grounds for belief that its business and his business would not be carried on in accordance with law and integrity and honesty. The Proposal alleged that Howard Dillon had altered or had permitted to be altered the odometers of nine motor vehicles in his possession between January 1980 and July 1982.

At the hearing, the Ministry led evidence, which was not contradicted by the Applicant, that he has pleaded guilty in Provincial Court (Criminal Division) to four counts of odometer tampering contrary to Section 19(1) of Ontario Regulation 665 made under the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 and thereby committed an offence under Section 22(1)(c) of the said Act. Five other counts were withdrawn at the time of his plea in December 1982. Mr. Crawford, who investigated the situation for the Registrar, and who swore the information as to the offences, indicated that

Mr. Dillon had co-operated fully as to his investigation. A chart filed at the hearing by the Registrar indicated that the total kilometres misrepresented to customers was 258,950.

Howard Dillon testified in his own behalf. Although he had informed Mr. Crawford throughout his investigation that he alone was responsible for any altering of odometers at his business establishment, he swore before the Tribunal that a former partner was responsible for the two motor vehicles of the nine which had the most serious alteration. Mr. Dillon indicated that the nine counts were isolated incidents and that since he commenced his dealership in 1972 he had only altered odometers in perhaps a dozen occasions prior to 1980. The Applicant indicated that each instance in which he had been charged involved a "pre-sold" motor vehicle and that the consumer was virtually protected by a generous warranty.

The Tribunal would like to comment at the outset of its decision that it has only concerned itself with the situations referred to in the Proposal and not any other conduct prior to 1980 alluded to by Mr. Dillon. As to Mr. Dillon's testimony, after having had an opportunity to observe his testimony the Tribunal is not satisfied that he was not involved in the two more serious alterations. Nor is the Tribunal, in light of the fact that two of the motor vehicles were sold to close relatives inclined to accept Mr. Dillon's version that each motor vehicle in question was "pre-sold" and that each transaction did not involve the strong inducement of each customer. We accept without reservation the evidence that Mr. Dillon was extremely co-operative and remorseful concerning his conduct. We also take into consideration that alternative employment for Mr. Dillon may be extremely difficult.

All previous decisions of the Tribunal confirm the extremely severe attitude it must take respecting the alteration of odometers by motor vehicle dealers and salesmen. Such alterations constitute in each and every instance a very serious fraud against consumers. The Tribunal accordingly accepts all elements of the Registrar's case as proven.

The Tribunal, therefore, by virtue of the authority vested in it under the Motor Vehicle Dealers Act, Section 7, directs the to Registrar to carry out his Proposal in respect to Town and Country Auto Centre as motor vehicle dealer and Howard Dillon as motor vehicle salesman. This Order will not take effect for a period of sixty days from the date hereof in order to permit the applicant a sufficient period of time to resolve his business affairs.

H & J AUTO CENTRE LIMITED operating as
TOWN AND COUNTRY AUTO CENTRE
HOWARD DILLON

MEETING TO CONSIDER AN APPLICATION FOR AN ORDER GRANTING A STAY OF THE DECISION AND ORDER OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL PENDING THE DISPOSITION OF THE APPEAL TO THE SUPREME COURT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
BARBARA SHAND, MEMBER
DONALD STRUPAT, MEMBER

COUNSEL: PAUL L. MULLINS, representing the Appellants (Applicants)

MICHAEL BADER, representing the Respondent

DATE OF MEETING: 19th September, 1984

REASONS FOR RULING

The jurisdiction of the Tribunal is contained in Section 7(9) of the Motor Vehicle Dealers Act which provides:

> "Notwithstanding that a registrant appeals from an Order of the Tribunal under section 9(b) of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the Appeal."

The Tribunal has heretofore noted that provision sets out the exception within Section 25 of the Statutory Powers Procedure Act which provides:

> "Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellant tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders."

The legislature has provided contrary to the Statutory Powers Procedure Act; the legislature has so indicated to the Tribunal that the Tribunal must use its discretion, and to rule on each specific instance coming before it.

The legislature did not see fit to set out any guidelines as was done, for example, in respect to applications dealing with a request for an extension of time by the Tribunal. Certain principles by which such application should be dealt with are set out.

The Tribunal must determine its own guidelines in dealing with an application for a stay. However, there have been set out in general law criteria by which the discretion should be exercised:

(i) that the appeal be bona fide. In this regard the Tribunal has no reason to believe that the appeal commenced is not bona fide.

(ii)that the grounds of appeal are substantial. In this instance the Notice of Appeal sets out a number of grounds of appeal and the Tribunal addresses itself to the grounds in respect of this requirement for they should contain the elements upon which the Tribunal ought to exercise its discretion. It is true that the applicants need not prove that the appeal will be won, i.e. that the decision is incorrect. Still there is an onus upon the applicant to demonstrate that there is some doubt as to the validity of either the decision making process or the decision itself and that the ground or grounds in themselves are of a kind that weight will be given to them.

In respect of paragraph 1 of the Notice of Appeal, if there had been some deficiency in the Notice of Proposal, the proper place to have raised it was either with the Registrar with a requirement for sufficient particulars and failing that, or in the alternative before the Tribunal. In any event, the Tribunal is of the opinion that the hearing was such as to enable the Applicants to fully defend as to the allegations upon which action was proposed to be taken.

In respect of the ground (or the grounds) related in paragraph 2, 3, 4, 5, the Tribunal is of the opinion that nothing therein indicates that the Applicants were in any way prejudiced either by the makeup of the Tribunal panel and the course of the hearing, or in the rendering of the decision.

With respect to the date of the release of the decision, this has been clarified, in that the original signed by the Tribunal shows a date of release by the Tribunal as 27th July 1984.

With respect to paragraph 6, the Tribunal is of the opinion that the nature of delay factor is not such as to raise sufficient support that the Applicants have not been treated fairly; the submission of double jeopardy is one which the Tribunal has accepted as not being applicable, because the Tribunal's jurisdiction and action is separate and apart from any other. The Tribunal is of the opinion that such a matter is one which should be raised elsewhere before the process of the Tribunal was concluded.

With respect to paragraph 7, the Tribunal is of the opinion that the Tribunal in its decision did not rely upon the evidence of Jack Crawford to the degree, if any, that would vitiate the findings.

(iii) that the balance of interest is in favour of the Applicants.

With respect to item (iii), the Tribunal has made reference in Re: Brandejs (released September 27, 1983). On page 2, the Tribunal stated:

> " On the merits of the application, counsel for the Appellant has very thoroughly made a submission as to the necessity of balancing the rights of consumers with the rights of an individual - in this instance, the right of Jan Brandejs to earn a livelihood which necessitates registration under the Act.
>
> ....
>
> The legislature in the passing of the.....Act through Section 6 has set out a right of an individual - an entitlement to registration, i.e. an entitlement to earn a living within the real estate business. However, the legislature has made such a right - the entitlement to registration - subject to certain exceptions. It has done so in the interests of and the protection of consumers.

....

> On balance in this instance, the Tribunal must decide in favour of the principle of consumer protection generally and protection of consumers within...field specifically.
>
> "

The Tribunal is aware that it refused a Stay (therein) which was subsequently granted by the Court. The Tribunal is of the opinion that the Court in arriving at its decision opposite to that of the Tribunal had in mind that the Applicants therein would be employed subject to supervision. In this instance, the operation is such that the Applicant Howard Dillon is really self-employed and is under his own supervision in the operation of H & J Auto Centre Limited operating as Town and Country Auto Centre. This distinction is a very significant and pertinent one.

In this instance, the Tribunal decides the balance in favour of the principle of consumer protection generally and protection of consumers within the motor vehicle field specifically.

Accordingly upon application made on behalf of H & J Auto Centre Limited operating as Town and Country Auto Centre and Howard Dillon for an Order pursuant to Section 7(9) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 as amended granting a Stay of the Decision and Order of the Commercial Registration Appeal Tribunal released the 27th day of July, 1984 pending the disposition of an appeal from that Decision and Order to the Supreme Court of Ontario (Divisional Court),

And upon reading the Notice of Appeal of the Applicants to the Supreme Court of Ontario (Divisional Court),

And upon hearing counsel for the Applicants and the Respondent, as well as such additional evidence as was this day adduced,

The Tribunal denies the application.

BERTON C. KELLEY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: BERTON C. KELLEY, appearing in person

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 25th April 1984

REASONS FOR DECISION AND ORDER

This has been an appeal by Berton C. Kelley from the Respondent's Proposal to refuse his registration as a motor vehicle salesman.

The evidence shows that the Appellant, in addition to having a number of criminal convictions registered against him, notably one relating to the use of a stolen credit card as recently as October 1981, failed to make full disclosure in his replies to questions in the Form of Application for Registration filed by him on March 25th, 1983.

The Tribunal has addressed the matter of failure to disclose in the Form of Application in at least two previous cases and these have been referred to it today.

The first of the cases referred to the Tribunal today was the case of Gilford Garage Service Limited and Theodore Ambury which is reported at p. 52 of Vol. II of the summaries of the Tribunal's decisions which is for the year 1982. The decision was released on November 30th, 1982 and on page 2 of the Reasons the following language was employed by our senior colleague Mr. John Yaremko, Q.C.:

> The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

The second decision to which we were referred was that in the case of Jack F. Cannon which was reported at p. 57 of Volume 12 of the summaries of the Tribunal's decisions which is for the year 1983. This decision was released on August 23rd, 1983, and on page 2 of the Reasons for Decision our colleague Mrs. Mary Jane Binks Rice, Q.C. used the following language:

> ....the Tribunal finds it incumbent upon it to state that it takes a very serious view of non-disclosure of past criminal convictions by an Appellant. Further, the Tribunal wishes to state that it whole heartedly supports the Registrar's policy to refuse registration and to serve a Notice of Proposal in all instances where there has been such a non-disclosure.

Section 5(1) of the Motor Vehicle Dealers Act reads as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where....
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty....

The Tribunal is extremely reluctant to deprive anyone of his source of livelihood. However, the interests of the public are paramount. In the view of the Tribunal, the Registrar's Proposal and the reasons for it cannot be set aside. We have great sympathy for the Appellant who says that selling cars is the only thing he knows how to do well. However, we do not find ourselves able to overrule the Registrar's Proposal. His views appear to us to be well-justified.

If, at a future time, the Appellant can demonstrate that he has reformed his ways, another application may be made by him pursuant to Section 8 of the Act.

In the meantime, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

RAY O'DONNELL MOTORS LTD. operating as
BYTOWN MOTORS and
RAYMOND J. O'DONNELL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL:	MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN WATSON W. EVANS, MEMBER CHARLES BELISLE, MEMBER
COUNSEL:	STEPHEN L. GOLDBERG, representing the Appellants STEPHEN AUSTIN, representing the Respondent
DATES OF HEARING:	26th, 27th June, 1984 13th July, 1984 Ottawa

REASONS FOR DECISION AND ORDER

The Appellants have appealed to this Tribunal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse them registration as a dealer and as a salesman respectively under the Motor Vehicle Dealers Act 1980, as amended, on the grounds that the said Registrar was of the opinion that the past conduct of the Appellants affords grounds for belief that the Company and O'Donnell will not carry on business in accordance with law and with integrity and honesty as provided in Section 5 of the said Act.

In the Notice of Proposal, the Registrar alleged the following particulars:

"

1. Raymond J. O'Donnell is the President, Director and majority shareholder of the Company which is incorporated to carry on business under the laws of Ontario.

2. On May 2, 1983 in the Provincial Court (Criminal Division) in the Judicial District of Ottawa-Carleton, Raymond J. O'Donnell pleaded guilty, on behalf of the Company, to ten charges of altering odometers.

3 The Company was fined $1,500.00 on each separate charge for a total fine of $15,000.00.

4. The Company is carrying on business under the name of Bytown Motors which name is not authorized by the Company's registration under the Act."

Counsel for the Registrar led evidence through Constable Pilotte of the Royal Canadian Mounted Police, Weights and Measures Branch, as to ten separate counts of the alteration of odometers. Based on the testimony of Constable Pilotte as to her own direct investigation, the documentary evidence filed with respect to each count, and the pleas by Mr. O'Donnell on behalf of the Company, the Tribunal is of the opinion that there is overwhelming evidence as to the alteration of odometers by the Company.

The culpability of Raymond J. O'Donnell raises an entirely separate question. There was no direct evidence of Mr. O'Donnell's involvement in the alterations. The Tribunal is not permitted to conclude his guilt, in his individual capacity, from the fact of his plea of guilty on behalf of the Company. Nor does the Tribunal draw any inferences against Mr. O'Donnell from the fact that he, as well as the Company, was originally charged with the alterations because these charges were withdrawn against him in their entirety. In order to ascertain Mr. O'Donnell's responsibility, it is necessary to examine the details of each count and the testimony as to the actual operation of the dealership.

The dealership is one of a moderately small size. Raymond J. O'Donnell was the only buyer for the Company and the testimony was that he was away from the business a considerable period of time purchasing used motor vehicles at auctions. As a result of his perpetual absences, he left the major responsibility for the operation with an unregistered salesman, James Shannon, who had come into his employ in the period in question. Mr. O'Donnell left blank documentation for the sale of the motor vehicles and it is his testimony that although his name and signature appear on virtually every document related to the sales of the motor vehicles in question, Mr. Shannon was the person who in fact concluded the transactions and and made the representations as to mileage.

It is the contention of Mr. O'Donnell that he should have known and did know the mileage of each motor vehicle he purchased but that he delegated virtually all sales in the period in question to the said Mr. Shannon and the said Mr. Shannon is responsible for the roll backs. Mr. Shannon was indicted "in his absence". Mr. O'Donnell did not produce Mr. Shannon to corroborate his testimony. Mr. O'Donnell indicated that Mr. Shannon had been working for him for at least one year but he was not aware of problems until Constable Pilotte "came calling". The Appellant further indicated that he had attempted to locate Jim Shannon but was unable to do so. He also indicated that at one point Mr. Shannon indicated to Mr. O'Donnell that if he had to testify he would lie, i.e. not corroborate Mr. O'Donnell's version of events. At the time of the commission of the alteration, Mr. O'Donnell testified that the odometers were merely read on the lot for the purchase and sale agreement and now records are checked.

After having listened to Mr. O'Donnell's testimony, and all the testimony as to the nature of this particular dealership, we find it difficult to conclude that Mr. O'Donnell would fail to notice, at least in several instances, the specific sale representations made as to mileage. For instance we find it difficult to understand how a dealer, even one who is frequently absent, would fail to notice that he is purchasing and selling what is in the trade known as "cream puffs", i.e. a 1979 Grand Prix sold in March 1982 with a reading of only 44,347 kilometres; a 1976 Chevrolet Nova sold in August 1981 with a reading of only 52,226 kilometres; a 1976 Dodge Aspen sold in October 1981 with a reading of only 56,000 kilometres. The Tribunal can come to only two conclusions with respect to Mr. O'Donnell's conduct. The first conclusion is that Mr. O'Donnell was aware that odometers were being altered at his dealership and as the active Director and main shareholder, entirely responsible for these activities. The second conclusion is that if he was not aware of these activities then Mr. O'Donnell permitted an operation in which for a lengthy period the tail wagged the dog and he was careless to the point where the Tribunal could only conclude that he was wilfully blind and the manner in which he conducts his business activities creates a danger to the unsuspecting public. The Tribunal was not impressed that there was no instance of compensation to persons who had purchased motor vehicles with inaccurate odometers nor Mr. O'Donnell's attitude that the purchasers had received fair value for their dollar.

The Tribunal considers the alteration of odometers in the sale of motor vehicles an extremely serious and reprehensible form of fraud against the consumer. In all the circumstances, the Tribunal is of the opinion that the alteration of the odometers by the dealership and Mr. O'Donnell's responsibility, either by omission or commission, is past conduct which affords "reasonable grounds" in the Registrar's opinion for belief by the Registrar that the Applicants in respective capacities as dealer and salesman will not carry on business in accordance with law and with integrity and honesty.

Accordingly by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal. This order will not take effect for a period of sixty days from the date thereof to permit the Applicants a sufficient period of time to resolve their business affairs.

CHARLES SHARIFF operating as
C.S. AUTO SALES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
DEAN MYERS, MEMBER

COUNSEL: CHARLES SHARIFF, appearing in person

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 23rd August 1984

REASONS FOR DECISION AND ORDER

The Appellant was granted registration as a motor vehicle dealer on the basis of an application that was made on the Registrar's standard application form which consists in part of a questionnaire to which in this case numerous false and untrue assertions were made by him notwithstanding the appearance on the face of the form of warnings and cautions to Applicants concerning false answers.

Again more recently the Applicant applied for renewal of this dealership registration through a form of applicaton for renewal of registration and again numerous false assertions were submitted. These untruths were identical to those given in the original application.

The renewal of registration sought has been refused by the Registrar by the Notice of Proposal now appealed from and the reason for this is that in the interim an inspection was made of the Appellant's premises by a Compliance Officer in which it was discovered, inter alia, that the business was being carried on from a residential building being a one family home contrary to the clearly stated provisions of the Act. Also that there was no sign displayed at the business premises indicating the nature of the operation in a manner protective of the public interest. Also that there was no lot adjacent to the premises as had been alleged or averred.

Also that no repair facilities appeared to be in existence adjacent thereto, again contrary to the averments which had been made. It also appears that the use of these premises would contravene the local zoning by-law, again contrary to the answers and assertions furnished in these applications.

In his written submissions at the hearing, the Appellant mentions in part "I needed to learn some effective techniques in order to operate the business successfully". We trust that this morning's hearing and the Tribunal's Decision will constitute, inter alia, a learning experience for him. In the opinion of the Tribunal, the Registrar's Proposal is irresistibly appropriate and will be upheld.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

LAWRENCE P. D. STRUNG

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

COUNSEL: JOHN D. STRUNG, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 25th May, 1984

REASONS FOR DECISION AND ORDER

Mr. Lawrence P. D. Strung, the Appellant, applied for registration as a motor vehicle dealer and at the request of Mr. Abrams, the Registrar of Motor Vehicle Dealers and Salesmen, attended upon Mr. Abrams for a personal interview during the course of which the Registrar expressed his concern in that it was Mr. Strung's evident intention to operate his dealership, if registration were granted, from premises already in use as a showroom and principle sales and office centre by another registered dealership, by which, in fact, Mr. Strung was employed as a mechanic. This offended the Registrar's established policy that two dealerships cannot operate from the same premises. Eventually the Registrar issued a proposal to refuse registration and from which the Appellant now appeals.

The reasons for the Registrar's policy, which is a policy of long standing, are fairly obvious, are numerous and clearly very much in the interest of the public. The purpose of the policy, inter alia, is to prevent confusion on the part of the public as to the identity of those with whom they are dealing and confusion, even chaos, in the industry. The Tribunal accepts and endorses the Registrar's policy, being in full agreement both with his logic and with his intention.

The present appeal presents a factual departure from the customary situation which tends to make it unique. The fact is that the motor vehicles with which the Appellant intends to deal are not motor cars. They are motorcycles:

smaller, and generally less costly vehicles. The dealership with which he proposes to share premises is also exclusively for the sale of cycles. And the volume of sales of these cycles, a very rare make imported from Italy, is Lilliputian - five to ten units per year.

There are already a number of them owned and in operation in Ontario. They were sold by the Appellant when he was in partnership with another registered motorcycle dealer - i.e., at a time when his sales operations were conducted as a part of the overall activities of another dealer which was in total and exclusive occupancy of its own business premises. That arrangement was and would not be offensive to the Registrar and is the kind of arrangement which, upon the facts of this case, the Registrar (and the Tribunal, as well) would prefer this Appellant to follow. But for some reason or reasons which are evidently valid such an arrangement is not available or conveniently or practicably available to the Appellant at this time in respect to his currently proposed co-tenancy of the proposed space. It may be added that another policy of the Registrar's, of equally long standing and thoroughly approved by the Tribunal, is that no registered dealership should be operated from a registrant's home. It may also be added that the income or profit from the sale of one cycle a month would not appear to be sufficient to pay the rent of separate sales premises, no matter how humble. So the Registrar's options are either to try and induce the Appellant to enter into an arrangement which he apparently finds more or less impossible or to deprive him of the right to carry on business and thereby deprive the public as well of the right to purchase his products or to obtain parts for such of them as are in present use here; or else, to vary the policy.

The Tribunal believes that the policy may be varied because the facts of the case are at variance with the customary factual situation for which the policy has been designed. That is to say, the case does not concern automobiles. In the case of automobiles, no matter what the circumstances, the Tribunal deems that the Registrar's policy must remain for all time completely inflexible. Cycles, on the other hand, are smaller and generally less expensive so that the cash flow and margin of profit may be lower - as in this case where the total annual sales are expected to be less than one cycle a month. Such small money would not permit the operation of separate premises.

The Tribunal feels that neither the public which has an interest in being permitted to purchase these rare machines and thereafter to buy parts for them nor the Appellant himself who has a prima facie right to earn a living (or earn an augmentation to the living he makes as a cycle mechanic) ought to be prejudiced by the application of a rule which makes extremely good sense in the case of automobiles but a good deal less sense - at least to us - in the case of a dealer in rare motorcycles, the sale of which, on the evidence, appears to be what might aptly be called a "vest pocket-sized industry" at best.

The Tribunal was referred to C.E.D. 3rd Ed. Vol. 1, Title 3 Administrative Law 1984 Supplement where, at p. 3 - 166 it is said that the discretion of an administrative decision maker should "......be exercised in relation to each individual matter coming before the decision maker and should not be automatically determined or even fettered by reason of a rigid policy laid down in advance": Re: Hopedale Dev. Ltd. and Oakville [1965] 1 O.R. 259 (C.A.): Winter vs. Saskatoon (1964), 47 E.L.R. (2d) 53 (Sask). And the Tribunal considers that statement to be a good governing principle in cases such as the present one and one which it is at liberty to apply by virtue of Section 7(4) and (5) of the Motor Vehicle Dealers and Salesman Act which reads in part as follows:

> (4)...the Tribunal...may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
>
> (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

The Tribunal was extremely well impressed by the Appellant's arguments as well as his general background and attitude. These it considered and considers exceptional, like the unique facts of this case. Its disposition of this matter is in a sense experimental and must in no way be deemed to operate in future cases as any kind of a precedent other than as an exercise of its statutory discretion. The Tribunal deems itself competent to treat each case as unique where the facts or principles involved appear to be unique. Nor does the Tribunal wish to give the impression th t it has anything less than complete respect for the Registrar, his policies and his manner of applying them. Yet the Legislature would not have given the Tribunal discretionary powers were it not meant to exercise them from time to time and it considers the present case a good one in which to do so.

Therefore, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar not to carry out his Proposal but to grant temporary registration to the Applicant over a period not to exceed three years, provided:

1. That the business will be operated under the name and style of Breganze Sports Motorcycles, and that the business address shall be 1525 Warden Avenue in the City of Scarborough and Province of Ontario.
2. That the business shall be limited to the sale of Laverda motorcycles only.
3. That the Appellant shall take all reasonable steps to avoid giving any impression that his business is the same as that of the other registered dealership, being a motorcycle business, which is in shared occupancy of the same premises and in that respect the Tribunal directs both parties to the Hearing to employ their best endeavours to develop appropriate ways to achieve that end.
4. The Registrar shall be at liberty to return to the Tribunal for further directions should he consider at any time during the term and duration of this Order that its spirit and intent are being improperly applied by the Appellant.

ABCON LIMITED

IN THE MATTER OF A REQUIREMENT FOR
A HEARING BY ABCON LIMITED

AS BUILDER

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD, VICE-CHAIRMAN AS MEMBER
STEPHEN PUSTIL, MEMBER

COUNSEL: JOHN T. GOODCHILD, representing the Applicant

BRIAN M. CAMPBELL, representing the Respondent

DATE OF
MEETING: 7th December, 1984

REASONS FOR RULING - NO JURISDICTION TO HOLD HEARING

In the matter of a dispute between the owner and the Applicant herein respecting a claim, Ontario New Home Warranty Program has issued two letters: Exhibit #2 a letter of July 12, 1984 and Exhibit #10 a letter of July 25, 1984, which are determinations of an obligation on the part of the Applicant.

The Applicant has requested of the Tribunal a hearing, basing an entitlement thereto, upon an interpretation of Sections 16(1) and (2), in conjunction with Section 14.

In Section 16 reference is made to the notice of decision together with written reasons therefor being served "on the person or owner affected". The Applicant submits that he comes within the description "person...affected" and has received notice of the decision (Exhibits 2 and 10).

The Applicant has submitted since the Tribunal routinely conducts hearings on the question of breach of warranty when owners receive a negative decision of the Corporation and request a hearing, that when the Corporation determines a breach of warranty and the vendor requests a hearing, the vendor should be entitled.

To accede to that request would in the opinion of the Tribunal change the role which it has viewed itself to have up to this date; the hearing is not a contest between the owner and the vendor but is a determination of the validity of the owner's claim in respect of which the Corporation may be directed to do certain things.

Counsel for the Applicant has pointed out that there would be the right of the Tribunal to add as a party the owner in any hearing proposed to be held. The Tribunal does have that power. The reverse situation is also true.

In respect of the Statutory Powers Procedure Act, Mundell in his Manual makes reference to a comparable situation with regard to a licence review board where it is provided,

> " The Director, the applicant, or licensee and such other persons as the Board may specify are parties to the proceedings before the Board under this Act. "

His comment is that

> " If the Board considers that a person other than Director or the applicant or licensee has a direct and immediate interest that will be affected by the decision of the Board it may, and should, specify such other person as a party to the proceedings. "

To accede to the Applicant's request herein, would in changing the concept of the nature of the hearing before the Tribunal, require that in all instances where an owner makes a request for a hearing that the vendor as a person who will be affected by the decision should be specified as a party.

The Tribunal is of the opinion that the word "person" in Section 16(1) does not include the vendor.

The Tribunal notes from its past deliberations, were the Ontario New Home Warranty Program to take the action of a Notice of Proposal, that in keeping with the Tribunal's practice to date, the issue which the Applicant would wish to be dealt with at the hearing requested, has in the past been dealt with. At such a hearing dealing with a Notice of Proposal, there has not to date been seen by the Tribunal any obligation for specifying as a party to such a hearing the owner; since the Tribunal will be dealing with a decision respecting a Notice of Proposal, the owner is not thereby affected.

The Legislature and the Lieutenant-Governor in Council created a concept with respect to the dealing with these matters as set out in the statute and Regulations, and the Tribunal is of the opinion that the proceeding which would encompass the hearing requested by the Applicant does not come within that concept.

Accordingly by virtue of the general authority vested in it the Tribunal Rules that there is no entitlement by the Applicant to a hearing under Section 16(2) of the Act.

B.A. ABRAMS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: B.A. ABRAMS, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF
HEARING: 17th May, 1984

REASONS FOR DECISION AND ORDER

This has been a claim for rectification of a major structural defect - a pier, pillar or column of bricks which appears to be supporting a somewhat overhanging garage roof. Whether or not it is supporting the roof, it is at least supporting its own weight estimated at between six and seven hundred pounds. It was alleged that the pillar is in danger of collapse. It appears that such danger of collapse would, if it exists, present a very serious, very frightening danger to life and limb as well as property.

There is no doubt that the Appellant is sincere and genuinely convinced as to the rectitude of his claim, which makes it very painful and difficult for the Tribunal to reach a finding of fact, upon the evidence, at variance therein.

However, the Tribunal has listened to and examined the evidence with absolute attention and care. Notwithstanding this, the Tribunal has found no conclusive evidence of the danger of collapse or the danger of imminent collapse and therefore is unable to concur with the claimant that the very terrible danger alleged does, in fact, exist. Were such a danger present, it would, of course, as he has argued, constitute a very material and adverse affect upon the intended use of these residential premises.

However, it is the opinion of the Tribunal that the pillar is not likely to collapse in the forseeable future. We would prefer it if we were able to reach a conclusion more favourable to the Appellant. We would gladly have given a decision more helpful to the Appellant had we felt upon a sincere assessment of the evidence able to do so.

In view of the foregoing, the issue in respect of Section 14 of the Statute which was raised by the Respondent and which had to do with a fund of monies held back by the operation of the Appellant's contract with the builder need not be further considered for the purposes of its decison.

The Tribunal thanks the Appellant for the clear, concise, lucid and polite presentation of his case. We wish him well and congratulate him upon his effort.

However, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

BOOTH, MR./MRS. ALFRED
BRODIE, MR./MRS. ALFRED
BROOKS, MR./MRS. ALBERT
CHANDLER, MR. GEORGE
COPELAND, MISS MARGARET
FLEMING, MR. JOHN
GAVIN, MS. DONALDA
GUNDERSON, MR. GEORGE
MASOTTI, MR. GINO
MEYNDT, MR. MARTIN
SCOTT, MR./MRS. GEORGE
YULE, MRS. JANET

Claimants

APPEALS FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

IN RE: ALGOMA CONDOMINIUM NUMBER ONE -
THE HARBOUR VIEW (SAULT STE. MARIE) LTD.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
R. MARTIN, MEMBER

COUNSEL: GEOFFREY R. PACEY, representing the Appellants
(with the exception of Meyndt & Yule
at the sittings held at Sault Ste. Marie)

ANGELO V. AIELLO, representing Martin Meyndt
at the sittings at Sault Ste. Marie

MALCOLM McLEOD, representing Mrs. Janet Yule
at the sittings at Sault Ste. Marie

BRIAN CAMPBELL and PATRICIA HENNESSY
representing the Respondent

DATES OF HEARING: October 17th, 18th, 19th, 20th, 25th, 26th, 27th, 28th, 1983 and November 1st, 1983 at Sault Ste. Marie and continued
December 5th, 6th, 7th, 8th, 9th, 1983 at Toronto

REASONS FOR DECISION AND ORDER

This hearing went on for fourteen days, the evidence and argument which followed being presented in exhaustive detail. Perhaps in contrast, the Tribunal now proposes to render these Reasons for Decision in a somewhat summary form giving a brief outline of the factual situation and relevant law as perceived by us and then showing how these and other proper considerations have come together, in our view, to produce the decision reached.

Harbour View, Algoma Condominium Corporation Number One, was the first condominium project ever undertaken in Sault Ste. Marie or in Algoma District and unique in the experience of nearly everyone who had anything to do with it - lawyers, architects, contractors, locally-elected officials, inspectors, licencing and utilities functionaries, real estate sales people, alike, and certainly, as well, unique in the experience of the general public and those members of the public who contracted to acquire residential units in it. Even the developers themselves, foremost of whom was Dr. Lukenda, a dentist, could scarcely be considered well-seasoned in this area of business and construction activity.

The building which is the subject of this case stands twelve stories high on the north shore of the St. Mary's River in one of Sault Ste. Marie's best and most desired residential sections. It was first conceived and indeed was erected to a height of some three stories with the intention that it should be a common block of flats or apartment house. But in 1981 certain changes in the ownership and changes in the design and construction concept came about, and thereafter the project, an enterprise which included building, promotion and sales, went forward as a condominium project.

The general public residing in the Soo community first became aware of Harbour View when advertisements appeared in the local press. These were intended by their creators to attract favourable attention, to give the impression that the units coming onto the market for sale would be highly desirable, endowing whomsoever might determine to purchase one of them with the prestige of a fine home at a fine address, with congenial neighbours, all the amenities and combining pride of ownership with the peace of mind which comes from security both physical and in respect to the safety of one's investment.

Other advertisements and promotional material soon followed such as a billboard (or billboards) and brochures. A sales office was set up and sales people were set to work. The impression which took shape in the mind of the average resident of the community at this stage, and which continued up until about when the leaves began to change colour in the fall of 1981, was that Harbour View would be a choice spot in which to live, a place for the favoured few.

It served the interests of the developers to sell the units as rapidly as possible. And at this point and in this connection certain distinctive peculiarities of the condominium concept of residential tenure seem worthy of mention; for example, the purchaser of a house usually makes only a relatively small deposit concurrently with his offer to purchase and pays no more until closing day when he produces the balance then due, usually cash to the mortgage(s). But those two stages of the transaction of conveyance are in condominium transactions extended to three or four stages, to wit, the Reservation Agreement, with the giving and receiving of a reservation deposit, and then the Agreement of Purchase and Sale with the giving and receiving of a further deposit, and then the Occupancy Agreement with a further and usually a very substantial deposit which may be the deposit of the full cash portion of the purchase price short only by the amount thereof to be secured by mortgage and finally the actual closing which consists of the giving and receiving of a deed together with the mortgage or mortgages which are duly registered.

It will be noted, and we trust with great interest, that in Ontario the deposits in respect to each unit transaction are protected through the operation of the Ontario New Home Warranties Plan Act up to the full limit of $20,000 and that such protection is evinced by a "Deposit Receipt" issued by the Warranty Program on its special form over the signatures of the Coporations' officers duly authorized in that respect, which form also bears the signature of the vendor or its proper officers in evidence of the recitals therein contained. The Deposit Receipt serves the purpose of assuring the purchaser of the protection provided by the Act in respect of the deposit monies referred to in it up to the full maximum limit of $20,000 (plus interest).

The amount deposited with the vendors and acknowledged by the Corporation in this way is quite frequently in the full sum of $20,000 - no more and no less. Such monies are customarily not placed in escrow or in any trust account but are applied by the vendor - typically a developer - towards his ongoing expenses in the completion of the condominium project. We believe this practice is a fairly standard one and well-known to the Warranty Program. We believe that the release of the funds thus deposited in this way for such purposes (as opposed to the retention of them in a trust account - which is what, at least in this case, was done with the amounts deposited in excess of the $20,000 figure) inevitably exposes the Guarantee Fund established pursuant to the Act to great risk but we feel as well that such enhanced risk belongs to the Warranty Program which tolerates it.

A second example of a feature peculiar to the condominium kind of residential tenure, one putting it in quite a different case from that where somebody rents an apartment in an ordinary apartment house, is that the condominium unit purchasers, at least the first of these, the ones who want their pick of the best units or those conforming best to their needs or special wishes, are expected to pay-up before the construction of the building is completed. This usually requires selling the previously-occupied residence (often, but not always a house) in order to make available the substantial sum usually required to be handed over to cover the deposit due at the time of the making of the Agreement of Purchase and Sale or Occupancy Agreement. In turn, the sale of the previously-occupied home, or the deposit in this way of so large a portion of the purchaser's capital, leads to the purchaser of a condominium unit either being or somehow feeling obliged to move into it (with the encouragement of the vendor) at a premature stage in the construction and/or proper vetting of the building and its essential appurtenances as a whole.

This is what led to dire dissatisifaction and untoward consequences in this case. Whoever heard of moving into a flat in a building which was an ordinary apartment house, which wasn't yet fully constructed? Yet even if someone did, how much easier for the tenant, if dissatisfied, to simply phone the movers and sue, perhaps, for the return of some prepaid rent. Indeed, the relative absence of stress for the apartment tenant in this example might well enable him to endure the vexations of life, even over several months, in an uncompleted apartment building with relative fortitude. But these people, the claimants in this case, had paid varyingly substantial amounts by way of deposits upon the signing of their Agreements of Purchase and Sale with the vendor. Then they had taken possession - either personally or, in one or more cases, by having their parents or other family members take possession.

This meant that they were and increasingly became super-sensitive to the many imperfections perceived by them in their position as residential occupants, vested in possession of the units occupied by them but not in title thereto, persons who had parted with quite substantial sums to cover the deposits required and who, as the winter of 1981-82 developed, were getting more and more dissatisfied with the condition of residency and dubious as to the wisdom of the investment they had made of their funds - substantial funds the proceeds in most cases of the sales of their former homes, in short, their life-savings.

The problems were numerous and their precise and minute details will be more readily available to persons privileged at some future time to access to the transcript of the evidence, if it ever comes to be produced, than we feel any need to describe in these lines. But we recall that they included trouble with the hot water supply, excessive condensation and the consequent formation of ice on certain aluminium mullions or members forming part of the windows and then water and water-caused messes, as well as problems with the elevators, the indoor swimming pool and its appurtenances and the garage arrangements. It was a very bitter winter and the Tribunal accepts that the Appellants who were in occupation or their tenants or relatives did in fact grow very dissatisfied as indicated above. They felt or suspected that the investments they had made had been unwise. They felt that they had become the victims of a number of material misrepresentations and otherwise were very unhappy. All the while the developers were muddling along trying to achieve completion of construction including rectification of the deficiencies more or less as they came to light. In fairness we must allow that many, perhaps most of these deficiencies in design and materials or workmanship could only, by their nature, be perceived and thus rectified on a _post facto_ basis, by which we mean after their function or malfunction had commenced and observations been made because the building was not being constructed to plans previously tested, certainly not in that location in the conditions uniquely thereto appertaining; nor were the developers or their workers seasoned to their tasks.

What we think is that it was unfortunate that circumstances required these Appellants to be in residence during this difficult period. Harbour View Condominium today is a perfectly reasonable and satisfactory place in which to live and, for example, one lady, Mrs. Weeks, who signed an

Agreement of Purchase and Sale more or less concurrently with the Appellants, lives there today in perfect contentment. But she didn't move in until the whole building was completely finished and all the deficiencies had been set to rights. She was either very wise or very fortunate to be able to delay her arrival as she did. Certainly she was spared much stress.

We think that anyone lacking great patience and endurance might well have grown faint-hearted and dissatisfied during the winter of 1981-82 and during the fractious spring which followed. These people had signed-up for a new standard of comfortable and "luxurious residential living" as specifically advertised.. Eventually the dream more or less attained realization and is today more or less being enjoyed by the present occupants - most of whom are tenants (renters) although some unit-owning occupants remain. But the Appellants in these proceedings did not become owners during the winter or following spring. They substantially lost their enthusiasm for the whole idea because of the experience of living in the building during that winter. What they had signed for, what they deemed to be their reasonable expectations, was what we might describe by analogy as a "luxury cruise" but what they got instead, at least during this 1981-82 problem period was passage upon a "shake-down cruise".

Everyone knows that taking a cruise on the Q.E.2 is an expensive and widely desired experience available only to the comfortably-off or to those older persons who have worked hard and with the approach or coming of retirement are able to indulge in some of life's material rewards. Rather like moving into a luxury condominium. But imagine the horror of booking a luxury cruise on Q.E.2 and finding oneself a day or so out of port, nowhere near the anticipated tropical waters but instead somewhere in the North Atlantic north of Iceland on a maiden voyage which was actually the ship's shake-down cruise - a cruise designed to bring to light every problem in the ship's design and construction that only the test of foul weather, high seas and actual operational experience could reveal! Of course, Cunard Lines do not offer to the public berths on shake-down cruises. But that, in our view, was precisely the trip Harbour View was giving to these Appellants during the unhappy period during which these events transpired which are the subject of our present review.

And there was a further factor which we think made a bad situation even worse. We mean not to be unkind, but our view, having heard 10 days of testimony and other evidence, is that Mr. John Fleming, the Chairman of the ad hoc committee of owner-occupants, inflamed dissatisfaction.

The Appellants, having made their substantial deposits and having moved into possession, experienced inconvenience, discomfort and uncertainty as aforesaid. Mr. Fleming, a busy person whom some might describe as a natural leader and whose background appears to lie in some sort of negotiating or systematic problem-finding function largely performed during his career with the Algoma Steel Company, assumed (or may have been propelled into) the role of spokesman for the owner-occupants. Under his aegis, an ad hoc committee came into being, comprised of those, mainly resident, purchasers under the Agreements of Purchase and Sale who felt the need to communicate with the vendor-developer corporation and its principals. These communications first consisted of complaints and then ultimatums and eventually a letter went out - marked as were all the committee's communications so far as we recall "without prejudice" - proposing or more or less demanding as conditions for closing the individual Agreements of Purchase and Sale certain terms by way of amendments to the prior arrangements - some of which were simply preposterous.

It appears that the developers at first tried to accommodate the demands of the ad hoc committee (whose first appearance was around November 1981) but as winter advanced and conditions deteriorated, both sides - the beseiged management-developer-vendor group on the one hand and the "mutinous" owner-occupants on the other - grew more panicky - although neither side would probably admit to the proper applicability of that word. We believe that both sides, in their own way, were greatly afraid that they were about to "lose their shirts". Such situations rarely bring out the best in people. In this case, it seems that the developers being the vendors under the Agreements of Purchase and Sale with the Appellants, decided to rescue their position, i.e. to cut their losses and retrieve whatever remained of their investment or (as we are told) break even, by selling (at a discount price) a total of 83 remaining units to a new entity and vacate the field of combat, i.e. disengage from further participation in the project and at the same time keep the Appellants' deposits.

The nub of the Appellants' problem is that the 83 units sold (at what Dr. Lukenda, the principal shareholder of the developer, called a "fire sale" price) were the units which the Appellants had earlier contracted to buy and in respect of which they had paid substantial deposits (in one case amounting to the whole of the purchase price!) and been given Deposit Receipts duly signed by the Warranty Program.

The Tribunal was told that the deposits had long since been spent by the vendors as part of their ongoing expenses in and about the construction and maintenance of the building. The nub of the Respondent's position in defending the Warranty Program's refusal to return those deposits (up to the limit set out in the Act or its Regulations) is that the Appellants had made a counter-offer or counter-offers which were supplementary, counter to, or at variance with the offer which had been accepted and made contractually binding upon the due execution of the Agreement of Purchase and Sale; that they had in fact rescinded or expressed an intention to rescind the several Agreements of Purchase and Sale - and in consequence, that the vendor (who may or may not have been in a position to do so) was under no obligation to return such deposits and in consequent consequence of which the Warranty Program (as guarantors of such deposits) were equally under no obligation to return the same and that the same were consequently forfeit and non-refundable.

The nub of the Tribunal's decision is that the Appellants are entitled to have their deposits back and that the Warranty Program must be directed to pay the amounts thereof out of the Guarantee Fund inasmuch as the vendors under the several Agreements of Purchase and Sale are unable to do so.

The Tribunal comes to its decision because it does not believe the various letters sent out by the ad hoc committee masterminded by Mr. Fleming - unfortunate as they may have been - did in fact vitiate the several Agreements of Purchase and Sale nor did they entitle the vendor to appropriate and retain for its own benefit the said deposits given and received, much as it would suit the convenience inclination and interests of the vendor and its principals were that so or the interests of the Guarantee Fund, as apparently presently perceived by the Warranty Program were it so. In a moment of (we felt) rather chilling candor Dr. Lukenda summed up his position on the fourth day of the hearing when he said that when a person goes into a store and makes a deposit on some goods and later fails to pay the balance then the merchant is simply free to keep the deposit.

That is not our view. In the view of the Tribunal the merchant or in this case the vendor in order to be free to keep his customer's deposit would have to show that there had been an agreed date upon which or prior to which the balance was to be paid or else that he had tendered the goods to the customer for delivery against payment of the balance due. In this case there was no settled date for closing apart from an obligation on the vendor under paragraph 5.07 of the Agreement of Purchase and Sale to complete (close) each and every one of the various Agreements of Purchase and Sale within twelve months of the occupancy date.

Most importantly the vendor never tendered in respect to any of these transactions. In one particular case, that of Mr. Gunderson, the full amount of the agreed price of the unit had been paid in cash by him! The vendor had merely to register the deed to him in order to complete the transaction! Instead, it chose to keep the first $20,000, the amount warranted by the Warranty Program. (Counsel for the Appellants used the word "confiscate".) Interestingly, that portion of Mr. Gunderson's deposit over and above the amount of $20,000, which had been held in trust, was returned to him as were the deposit monies of each and every other purchaser which exceeded $20,000 and had been deposited in trust with the Canadian Imperial Bank of Commerce. The reason for this was that no one could possibly come up with any reason why the monies held in trust by the Canadian Imperial Bank of Commerce for such persons should not be returned to them.

It is impossible for us to perceive any difference between the first $20,000 of the deposit monies and any amount in excess of that amount, at least that which would affect the quality of such monies as deposit monies or their refundability to the purchasers. There is, of course, a very real practical difference between the first $20,000 which Mr. Gunderson paid and the next $40,000 which he paid. The funds in excess of the first $20,000 were kept in a safe place - Canadian Imperial Bank of Commerce Trust account. The first $20,000 were given to the developer - the vendor - and were spent. They were the subject of a Deposit Receipt underwritten by the Warranty Program and the Warranty Program does not want to part with this $20,000. That is the difference. The Warranty Program relies on an argument which in turn relies in the course of its convolutions upon a very strict, we may say harsh, interpretation of the law which may be called the attempted application of the very letter of the law.

The Ontario New Home Warranties Plan Act in the view of this Tribunal is remedial consumer legislation and its purpose and intent as we perceive it and have always perceived it is primarily the protection of the consuming public. We were referred by the Appellants to section 10 of the Interpretation Act of Ontario.

During the time while the Tribunal was deliberating this case an interesting article carried recently in the Osgoode Gazette (Vol. 18) and contributed by the Honourable Mr. Justice John Morden of the Ontario Court of Appeal came adventitiously to our attention. This article was based on an address delivered earlier in 1983 by His Lordship at Knox College, Toronto, during the course of which he referred to section 10 of the Interpretation Act as "our most basic legislative instruction as to how to read a statute" and gave special emphasis to the section's last word, the word "spirit" which he indicated derives from scripture:

> "...for the letter killeth but the spirit giveth life".

We sought, in pondering this case and seeking what we thought should be the just determination of the issue, the assistance of that section and in applying what we perceive to be the "spirit of the legislation" we concluded that the Act looked to by the Appellants for relief, the Ontario New Home Warranties Plan Act, was enacted by the Legislature for the protection of consumers and particularly consumers, members of the population of this Province, who for one reason or another would be, apart from such protection offered by such legislation, particularly at risk. The developers, behind whom the Warranty Program in a case such as this is obliged to stand, were business men and the funds belonging to them which were set at hazard by them were funds hazarded in an adventure in the nature of trade and business. On the other hand, the funds set at risk by the Appellants represented in most cases capital sums, the product of the sale by them of their homes, or, as we have put it earlier, their life savings (or a large part thereof). We feel that these people are the sort of people who are the intended beneficiaries of the statute's protection, and among the Appellants who appeared before the Tribunal there are several whom we felt particularly qualified to receive it. One was a nurse who, approaching middle life, had come into a small inheritance as we gathered from her testimony, probably an inheritance which will not come her way again. That is the money she seeks returned to her and not appropriated to the benefit of the syndicate of investors headed by Dr. Lukenda, whose notions of fair play we have already touched upon, or to the benefit of the Guarantee Fund administered by the Warranty Program.

During the course of argument certain points were submitted on behalf of the Appellants to which we will make particular reference at this time and without limiting the Tribunal's general acceptance of the Appellants' argument taken as a whole.

The Tribunal was referred to Section 14(1)(a) of the Ontario New Home Warranties Plan Act which reads thusly:

The Tribunal was told that the essential elements of section 14 (upon which the claimant would be entitled to proceed) are that the claimant must be a person who has entered into a contract with a vendor for the provision of a home and has a cause of action against the vendor for financial loss arising from the bankruptcy or the vendor's failure to perform the contract. We accept that.

Further, the Tribunal was told that the evidence disclosed firstly, although there had been no assignment in bankruptcy, that Harbour View was clearly insolvent within the meaning of the federal Bankruptcy Act (Section 24(1)(j)) because at the times material to the issue it was unable and in fact had failed to meet its debts and obligations as they fell due - in particular the first and second mortgages as well as payments owing to certain construction companies and contractors, that of Mr. Barban as well as River Villa Construction Ltd. who filed mechanic's liens. There were other mechanic's liens on title as well. The Tribunal accepts this submission.

Secondly, it was submitted that the vendor Harbour View had failed (for its part) to perform the contract by failing to designate a closing date as stipulated at paragraph 5.12 of the Agreement of Purchase and Sale (which should be read with paragraphs 1.03 and 10.01). The Tribunal has stated (above) its view concerning the obligation of the vendor respecting tender. We hold that this obligation is both contractual and statutory.

It was further submitted that paragraph 5.07 of the Agreement of Purchase and Sale created an obligation on the vendor Harbour View to close within 12 months of the occupancy date in each case and that its failure to meet such obligation vested in each purchaser the right to cancel his or her contract and to receive back all funds deposited (save as excepted by the provisions of the contract, viz. save for interim occupancy rent and other proper deductions related thereto).

The said paragraph 5.07 reads as follows:

> The Vendor covenants to proceed with all due diligence and dispatch to attempt to register the Declaration as quickly as possible. If the Vendor for any reason whatsoever, except through its own wilful default, is unable to register the Declaration so as to enable delivery of a registrable transfer to the Purchaser within twelve (12) months of the Occupancy Date then, unless the parties otherwise agree in writing, the Purchaser shall have the right to declare this Article 5.00 and the Purchase Agreement, notwithstanding any intervening acts or negotiations, at an end and all monies paid by the Purchaser towards the purchase price subject only to a proper set-off for claims of the Vendor for extras shall be returned to the Purchaser without deduction; provided, however, that the Vendor shall not be obligated to return any monies of the Purchaser paid in pursuance of the Purchaser's occupancy of the Unit or in the pursuance of extras ordered by the Purchaser unless the parties otherwise agree in writing.

The Tribunal accepts this submission.

It was further submitted that an obligation, both contractual and statutory, existed to complete each home, as well as the common elements, in a good and workmanlike manner. The Tribunal is not satisfied that this obligation had been fully performed at the time of the de facto appropriation of the deposit monies.

In a further submission on behalf of the Appellants, Section 52 of the Condominium Act, R.S.O. 1980, Chapter 84 was referred to which reads in part:

> 52.(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on

> the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.
>
> (2) The purchaser before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.
>
> (3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.
>
> (4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, that person under the agreement that was credited as payment against purchase price.

It was further submitted that the Appellants were ntitled to succeed (inter alia) by virtue of the operation of hese statutory provisions upon the facts as disclosed in vidence. This, too, the Tribunal accepts. In particular, and ithout limiting the generality of this finding, the Tribunal olds that there was a "material amendment" as referred to in he said section 52 and that this consisted of the failure to rovide the Rooftop Party Room or "Luxurious Penthouse Common rea" as it was variously and at various times described.

In respect to the Rooftop Party Room, the Tribunal olds that it was held out as an attraction or inducement. For xample there was a letter reading as follows:

TRI-CORP
REALTY LTD.

November 18, 1980

Mr. John Fleming
259 Upton Road
Sault Ste. Marie, Ontario

Dear Mr. Fleming:

Please find enclosed a brochure of the Harbour View Condominium in which we have indicated the floor plan of the suite which you have purchased. The common areas illustrated in the brochure reflect the good taste and design to be found throughout the entire building. The luxurious penthouse common area invites a relaxing atmosphere as well as providing a magnificent view of the city of Sault Ste. Marie and the St. Mary's shipping canal.

The Condominium documentation is presently in the process of being finalized and in addition to this we are preparing a "Spec Sheet" fcr your benefit in order that you may choose carpeting, cupboards etc. to personalize your unit.

An agent from our office will be contacting you in the near future to review the Spec Sheet with you.

If there are any further questions please do not hesitate to contact me.

Yours truly,

TRI-CORP. REALTY LTD.

"Michael J. Feltham" (signature)
Michael J. Feltham

Even though this was due to the intervention of factors which the vendor had not yet discovered at the time of the making of the inducement, and which the vendor tried to some extent to make up for, the Tribunal upon the evidence holds that the purchasers are in fact, at their option, entitled to invoke the provisions of section 52 of the Ontario Condominium Act in their favour.

The "materiality" of the "omission" depends on what was happening in the minds of the persons at the critical points in time i.e. when they were being "attracted" or "induced", something most difficult for tryers of fact to determine. But the Tribuanl holds that the Appellants have averred that the promise of a Roof Top Party Room was "material" in its effect upon their decision or decisions to enter into the contract(s) and it has not heard sufficient evidence to persuade it that such averment should be rejected. The Tribunal therefore accepts that the promise of a Roof Top Party Room was a material inducement and its subsequent omission equally material - constituting a "material amendment" in the language of section 52 or otherwise for the purposes of this decision. It is something that these people were reasonably entitled to expect; within the area of their reasonable expectations under the contract. The same we hold to be true of the "docking facilities".

The Respondent's argument in defense to these claims was submitted with high skill and impressive force. It would be hard to imagine a better presentation not only in terms of the painstaking preparation which clearly lay behind it but also in respect of the unflagging - one might well say indomitable - energy with which it was presented. The Respondent argued that the Appellants as purchasers had no intention of completing the transactions, that they sought to escape their responsbilities. The Tribunal says that issue, the question of the purchaser's intention to close or not to close might certainly have been tested in a time-honoured fashion: by the vendor tendering. This would have settled the issue of the purchasers' desire to close and it also would have settled the issue of the vendor's capacity or ability to make title, which has been brought into question. But the vendor did not tender on the purchasers. Instead, Harbour View conveyed to another purchaser and simply pocketed the deposits. The Tribunal holds that this was wrong and thereby entitles the claimants to succeed.

The Respondent argued that proceedings such as these (i.e. the prosecution of the Appellants' claim which is of course for refund of desposit monies) are defined by the Proof of Claim Statement - that the claim in each case must be limited to that. This is the classic argument that the "letter" of the law ought to prevail versus the "spirit" of the law which, as indicated above, the Tribunal rejects for the reasons stated and especially as this is consumer legislation, remedial in nature, intended to protect members of the public as consumers.

We are in favour of discipline and good order in the conduct of affairs of every kind, never presuming to flout the positive intentions or purposes of legislation where clearly stated. But, with respect, we do not find that the Proof of Claim Statement, which is a statement made by lay members of the public for the purpose of recording a claim - in this case, a claim for the return of deposit monies - is the same thing by any means as a Statement of Claim in civil litigation, which is a highly specific technical document drawn by lawyers to be read by lawyers and perforce relatively exhaustive (but which, even so, is capable of amendment upon leave). On this point, the Tribunal conceives that it is entitled to have regard to section 10 of the Interpretation Act whereby it concludes that a "fair, large and liberal" interpretation must be given to whatever law defines the purpose, purport and effect of this "Proof of Claim Statement" and the Tribunal concludes that, for the purposes of the appeals presently before it the function and effect of the Proof of Claim Statement is to state or assert a claim in this case, a claim for the refund of deposit monies - but that (however convenient it would be for the Respondent), especially, but not exclusively, upon a reasonable consideration of fairness and practicability, the claimant ought not necessarily to be prevented from expanding the proof or proofs of such claim beyond the particulars endorsed on the face of that document at the time when it is presented.

Consequently, if one of the claimants requested the return of his deposit monies because the vendor was allegedly providing accommodation in the building to tenants as opposed to owner-occupants, and then, but on no further or additional grounds, alleging a breach of the Agreement of Purchase and Sale, the Tribunal would be inclined to hold that such claimant had filed a claim for the return of deposit monies upon the ground of breach of contract and to permit the introduction of further evidence of the alleged breach as the claim was subsequently prosecuted, provided that no gross prejudice to the Respondent was thereby caused. If one of the several claimants in this case adopts elements brought forward in another claimant's case but equally applicable to his own claim, the Respondent cannot (in the specific circumstances of this case) be deemed to have been prejudiced since it has had notice of and opportunity to prepare its defence to each of such elements.

[These same Proof of Claim Forms are also used in claims greatly differing in nature or type from those which have been heard in this case. For example, claims for the repair of specific physical defects. And so the Tribunal would just note, in passing, that there would be cases where claims would have to be limited to items particularly in the claim form in the interest of fairness. But that is not the situation here.]

The Tribunal interprets the vendor's failure to tender as evidence (if not proof) of an inability to close upon which, together with the other evidence we have regarding the vendor's position, it is open to us to find an inability. We do not, in fact, believe that the vendor at the times critical to our decision had either the inclination or the ability to close with the Appellants. In short, we do not think that Harbour View as vendor under the Agreements of Purchase and Sale herein was, during the final stages of its relationship with these claimants, dealing with them either fairly or with the degree of integrity which is required. The Tribunal holds that the claimants as Appellants herein are entitled to succeed in the claim for the refund of their deposits, specifically to the full amount of such deposits as evidenced by the Deposit Receipts herein. The Tribunal holds that Harbour View was under an obligation to demonstrate its ability to close with the Appellants in the terms of the Agreement of Purchase and Sale - a complete ability, being a financial ability, as well as a legal ability consisting of the ability to make or pass title. The same being put into dispute we hold that the onus was on the vendor to settle that issue as a precondition to any right to take and keep the deposit monies.

An excellent expert witness was called to give evidence upon the question of breach of warranty arising from poor workmanship and poor materials. The Tribunal accepts without reservation that at the time of Mr. Cooper's inspection the construction of the Harbour View project, at least those parts covered by his testimony, had been fully completed and in an eminently satisfactory manner. That is not to say that during the course of construction, during the months of interim occupancy by the Appellants, there were not some ostensible breaches of warranty which could have justified rescission. But the issue in this connection is superflous to the Tribunal's purposes in achieving its decision which has already been indicated together with the essential grounds upon which it rests.

Consequently, by virtue of the authority vested in it by Section 16 of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to allow the amounts claimed up to $20,000.00 and due interest pursuant to section 53 of the Condominium Act and section 33 of Regulation 121 of the Act.

BRUCE BEACOM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: ROBERT SPENCE, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 17th, 18th, 21st and 22nd November 1983

REASONS FOR DECISION AND ORDER

The factual situation herein is similar to that in re *Rayner* and in re *Lockwood* (Reasons for Decision and Order issued contemporaneously subject to variations (not relevant) of time and figures but with some differences. The Tribunal adopts the findings, reasons and rationale applied in re *Rayner* and in re *Lockwood* as applicable to that part of the factual situation herein of similar nature.

The Tribunal finds that the deposit of $2,000 referred to in the Agreement of Purchase and Sale was in fact paid.

The issue to be determined by the Tribunal is whether the moneys paid by the purchaser were deposits as defined in Regulation Section 1(1), i.e. "moneys received...by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.."

The Tribunal finds in the affirmative with regard to all monies paid.

In this matter: there was an undertaking by the solicitor to hold the monies paid on the interim closing in a term deposit; the purchaser has made a claim for compensation to the Law Society; no judgment has been obtained. The Tribunal reiterates its opinion that these facts are not relevant to the issue of whether the monies were paid as deposits on behalf of the vendor.

The Tribunal finds that the purchaser is entitled to compensation by virtue of Section 14(1)(a), the limits being fixed by Regulation Section 6(1) and (2).

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to allow the claim in the amount of $20,000 and due interest pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

BRENT BERTRAND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: H. JAMES MARIN, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 17th, 18th, 21st and 22nd November 1983

REASONS FOR DECISION AND ORDER

The factual situation herein is similar to that in re Rayner and in re Lockwood (Reasons for Decision and Order issued contemporaneously), subject to variations (not relevant) of time and figures but with some differences. The Tribunal adopts the findings, reasons and rationale applied in re Rayner and in re Lockwood as applicable to that part of the factual situation herein of similar nature.

The Tribunal finds on the evidence before it, that the monies in the amount of $1,000, $4,000, and $16,000 paid to Bookman & Associates in trust were deposits received on behalf of the vendor. Though no written direction in respect thereof was filed before the Tribunal, the Tribunal finds that in fact the $16,000 was paid pursuant to a direction from the vendor.

It notes further that a Judgment has been obtained by the plaintiff against the defendant for return of deposit paid in the amount of $21,000. It would be incongruous if a decision in the Civil Courts giving rise to such a Judgment would be contradicted by a finding by the Tribunal that monies paid were not a deposit.

The issue to be determined by the Tribunal is whether the moneys paid by the purchaser were deposits as defined in Regulation Section 1(1), i.e. "moneys received...by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.."

The Tribunal finds in the affirmative with regard to all monies paid.

The purchaser has made an application for payment out of the Compensation Fund of the Law Society of Upper Canada . In an Affidavit with the application the purchaser declared:

> " 13. It is my belief that a solicitor and client relationship could reasonably be said to have existed between myself and Steven Miles Bookman insofar as I entrusted him with funds pursuant to the Agreement. In so doing, I demonstrated my confidence that he would exercise his duties in connection with that trust in an honest and professional manner.
>
> 14. I believe that Steven Miles Bookman wrongfully paid over these monies which were expressly payable to Bookman & Associates, in trust, to the Vendor without my direction and prior to closing. As a result, I have suffered a loss in the amount of $21,000.00."

The Tribunal is of the opinion that such statement does not invalidate a finding that the monies were deposits within the meaning of the Act and Regulation. As stated in the letter of the Secretary of the Law Society of Upper Canada of April 13th, the purchaser "would have to prove...a solicitor and client relationship in existence between (the purchaser) and Mr. Bookman."

The Tribunal finds that the purchaser is entitled to compensation by virtue of Section 14(1)(a), the limits being fixed by Regulation Section 6(1) and (2).

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to allow the claim in the amount of $20,000 and due interest pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

M. BHATTI

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: M. BHATTI, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF
HEARING: 13th June, 1984

REASONS FOR DECISION AND ORDER

The Appellant's claim had to do with certain problems in the roof of his home which were brought to the attention of the Warranty Program beyond the expiration of the first year of the warranty but within the five year period. Therefore, in order to succeed it was incumbent upon him to demonstrate a major structural defect as defined.

The evidence discloses the presence of mould under the roof resulting in partial delamination of the plywood sheathing of which the roof of the home is partially composed.

The evidence further disclosed that the system provided by the builder for the ventilation of the bathroom whereby moisture and moist air was to be exhausted from the home was deficient in that moisture and moist air was not being conveyed out of the building but rather was being deposited within it under the roof adjacent to the roof and thus causing the delamination and/or rot in the plywood sheathing referred to.

Sentence 9.19.1.1(1) in the Ontario Building Code provides as follows (under the heading of "Ventilation"):

> Except as provided in Article 9.19.1.2, every attic or roof space above an insulated ceiling shall be ventilated to the exterior as follows,
>
> (a) 1 sq ft of free unobstructed ventilating area for each 300 sq ft of insulating ceiling area for roofs with a slope exceeding 2 in 12...

and again at Sentence 9.33.4.5 we read:

> Exhaust ducts shall discharge directly to the outdoors and whether the exhaust duct passes through or is adjacent to unheated space, the duct shall be insulated to prevent moisture condensation in the duct in accordance with Sentence 9.34.6.1.(2).

It is common ground that the provisions of the Ontario Building Code have been breached by the builder in contravention of Section 13(1)(a)(iii) of the Act. However, it is also clear that a major structural defect as defined must be present in order for the Appellant to succeed.

The definition of major structural defect is to be found in Regulation 726 R.R.O. 1980, section 1, paragraph (o).

One of the exclusions to the concept of a major structural defect as defined is to be found in the word "dampness".

In the Tribunal's opinion, the problem here is not "dampness" but that which is the result of dampness - not dampness per se but its consequences which we deem to be different and therefore not covered by the exclusion. In reaching this conclusion, we are assisted by the provisions of the Ontario Interpretation Act, Section 10 which reads in part:

> Every Act shall be deemed to be remedial...and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

We feel the fair interpretation of the Act is that it is meant to provide protection to consumers, being the owners of new homes and that it is proper to conclude that the word "dampness" in the interpretation section of the Regulation cited means "dampness" as an end result - not where it appears as part of a causal situation, i.e. as part of the cause of a particular end result.

In the Tribunal's view, the delamination (and/or rotting) of the plywood roof (or the plywood forming part of the roof) constitutes an adverse effect upon the function of that roof. The plywood carries a load - it is part of the roof. When delamination occurs it is in a state of disintegration and its function is then adversely affected. That is the finding of the Tribunal.

The appearance of the shingles, which have been described as "uneven" or of the blackness due to fungal growth, are in our view "cosmetic" problems not warranted, and will not be the subject of any order. But the improperly constructed ventilation system will be.

The Tribunal therefore directs that the improperly installed bathroom venting be reinstalled in accordance with the Ontario Building Code, that is to say properly insulated and vented to the outside and as well that the delaminated sheeting be replaced. Such new shingles as may be required as necessarily incidental to the work shall be supplied but the Respondent shall do no work of a merely ornamental nature.

The Tribunal further directs that the soffit vents be cleared of the insulation material presently clogging them and that preventive steps be taken to prevent them from becoming clogged again.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Corporation to allow the claim in part and in accordance with the foregoing.

GORDON J.Z. BOBESICH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: GORDON J.Z. BOBESICH, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 20th March 1984 Sudbury

REASONS FOR DECISION AND ORDER

The Appellant Gordon J.Z. Bobesich appealed a decision of the Respondent disallowing his claim which was a claim that a major structural defect as defined existed in his house consisting of certain cracks in the brick veneer cladding of his house situated in the City of Sudbury. (There was also a claim in respect of defects in certain installations in the kitchen which was not effectively pressed.)

Section 13(1) of the Ontario New Home Warranties Plan Act describes the warranty which is provided by this legislation. Subsection (2) of section 13 states that "A warranty under subsection (1) does not apply in respect of" certain specifically excluded conditions including "(f) damage resulting from improper maintenance". In other words, the Act contemplates that adverse situations may develop during the course of the use and occupation of a home which are the result of the failure by the person responsible for providing proper and normal maintenance to do so. Certain materials employed in certain specific methods of construction require to be maintained in a specific way. For example, wood and woodwork requires to be painted at regular intervals. Asphalt rooves and other rooves require maintenance of a specific nature which is specific or particular to the nature and character of the same.

Eaves troughs and down pipes require from time to time to be kept clear of leaves and other debris which commonly become lodged in them. Ordinary bricks, of the kind employed in solid masonry construction, require to be tuck-pointed from time to time. Common sense and general experience imply the kind of maintenance required in specific circumstances.

Where a house is constructed of frame or other non-masonry materials and then covered with a veneer of imitation brick or tile for cosmetic or decorative purposes, these tiles will require maintenance from time to time in accordance with the same basic principles, to wit, commonsense and general experience as they relate to the materials in question and to the use to which they have been applied including environmental conditions.

A consideration of section 13 and the definition of the term "major structural defect" as it appears in the Regulation to the statute ought to have made it fairly clear to the Appellant, who is a member of the Ontario Bar, what kind of a warranty is given during the last four years of the five year warranty period. It is, expressed shortly, a warranty against very serious defects indeed, defects which would be categorized as "major" as opposed to "minor" or something lying between major and minor. Certainly a major structural defect must either affect the load-bearing portion of the building or materially and adversely affect it in its load-bearing function or (additionally or alternatively) materially and adversely affect the use of the building for the purpose for which it was intended. It has been previously ruled that the purpose of a residential building commonly known as a home is ordinary human residential occupancy in the normal course of affairs.

The Tribunal perceives no evidence that the residence in question has been adversely affected in its basic use, that is to say normal occupancy by people. As to the load-bearing function of these veneer tiles, we do not perceive that it exists. The house is not held up by them. They are not bearing a load in the sense that they are load-bearing members of the building as such. If the situation complained of were permitted to further deteriorate and if all the tiles eventually dropped off - a situation which would no doubt be accelerated by the absence of proper maintenance, i.e. the repair of cracks and the replacement of any one or two tiles that might drop off - we doubt that the house would ever collapse by that reason. Dampness might become a problem and the use for which the house was intended, that is to say, as a dwelling place for people, might eventually be compromised or adversely affected. But this result would not come about because of any major defect in the tiles, it would come about as the result of improper maintenance.

In the Tribunal's opinion, the Respondent's decision was an entirely proper one and the Appellant has totally and altogether failed to demonstrate any claim for which the Tribunal could grant him relief under the statute and its Regulation as it stands and certainly not as the Tribunal has interpreted it in previous decisions.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

BRADBURY CONSTRUCTION LIMITED

APPEAL FROM THE PROPOSAL OF THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: JOSEPH NEAL, representing the Appellant

PATRICIA HENNESSY, representing the Respondent

DATES OF HEARING: 17th and 26th April, 1984

CONSENT ORDER

WHEREAS this matter came on for hearing this 26th day of April, 1984, and submissions were made by the parties.

UPON consent of both parties, the Tribunal makes the following Order:

WHEREAS a letter has been duly executed under seal in evidence of the voluntary surrender of registration of Bradbury Construction Limited as a registered builder under this Act;

AND WHEREAS Bradbury Construction Limited has provided the Respondent with a Promissory Note in the amount of $8,217.70;

AND WHEREAS Bradbury Construction Limited has given to the Respondent an Undertaking to deliver within thirty days all outstanding Certificates of Completion and Possession (the last two documents having been executed under seal);

AND WHEREAS THE Appellant has assured the Tribunal as well as the Respondent that it has full and proper authority to execute the documents herebefore recited;

NOW THEREFORE by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to accept the voluntary surrender of the Appellant's registration herein.

MR. AND MRS. S.J. BRENZEL

APPEAL FROM THE DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: MR. S.J. BRENZEL, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATES OF HEARING: 18th October 1982
24th April 1984

REASONS FOR DECISION AND ORDER

This hearing commenced on October 18, 1982 and was continued on this date (April 24, 1984).

The Appellants' claim throughout has been a claim for a major structural defect, something that arose or was first brought to the attention of the Program beyond the expiration of the first year of the Warranty.

The evidence is that water has come into the house causing a problem. The nature of the phenomena on which the claim is based is set out at paragraph 6 of the Proof of Claim, Part F, Exhibit 14b where the claimants stated as follows:

> One of the structural beams supporting the roof structure is not attached at its cross beam. There are nails going through the end of this structural beam but the nails do not attach to the cross beam as they obviously should attach. As a result, the portion of the roof which these beams should support has warped downward, due to the space opened by the unattached beam. This warp in the roof has created a leak in the roof and water damage below this warp, thus, adversely affecting the intended use of the roof and the house.

These phenomena were referred to by the Program in its decision letter (dated February 16, 1982, part of Exhibit 4) in these words:

> The inspection report indicates that a section of solid block has not been securely fastened to the truss at one end.

The letter then goes on to mention a "damp spot in the ceiling at the subject home".

It is the opinion of the Tribunal which has heard testimony and also examined certain photos exhibited that the essence of the problem is or was that a strut had broken loose for some unknown reason which carried part of the load of the truss. However, this has been repaired and no further damage
has resulted. The dampness and the crack in the drywall ceiling in the Tribunal's opinion are due to causes which have not been proven.

The Warranty given by this legislation is set out in section 13(1)

Section 13(2) cites certain exceptions to the warranty.

Since the claim was brought beyond the expiration of the first year as aforesaid, it has been incumbent on the Appellants to prove a major structural defect as defined at Section 1(o) of Regulation 726 to the statute.

The Tribunal is satisfied that the problem or problems in question is or are not one where any impairment of any load-bearing function of the building exists or where the load-bearing function of any part of the building is adversely affected.

The Tribunal finds that a "damp spot" and some cracks exist. These are defects. A slight malformation of the roof evident in one of the photos is also a defect and indeed a structural one. But the Tribunal cannot conclude that these defects are at all "major" as the word is applied in our view or intended to be applied by the definition nor that anything demonstrated by the Appellants complies with the requirement of Regulation 726, Section (1)(a)(ii) constituting a material and adverse affect upon the use of the building for the purpose for which it was intended. The Tribunal has held on diverse occasions in the past that the intended use of a residence is residential occupancy in the normal course; and that this residential occupancy is of the house as a whole - not just one room. But the male Appellant testified that the very room where the leak, stain or crack exists, is used on a continuing basis as a bedroom for a child of the family.

The Tribunal concedes that the Appellants have a problem or problems but what the Appellants have failed to demonstrate is that their problems are warranted under this Act.

The preamble to the statute recites that it is an Act intended to provide certain protection to the owners of new homes. That certain protection is finite. It is not absolute and total nor is it intended to be absolute and total. It does not even approach, for example, the kind of total and absolute protection that a mother gives to a child even during the first year (in either case).

During his cross-examination of the Respondent's witness, the male Appellant asked if one of the purposes of a home was to be marketable or words to that effect. The Tribunal concedes that people buy houses with, as part of their intention and motivation, the intention to secure their savings in a good investment and eventually to turn a profit on resale. But that has nothing to do with the intended use of the building which is covered by the definition major structural defect given or intended to be given protection by this legislation, at least during the last four years.

There was mention by Mr. Vissar, who gave evidence on behalf of the Respondent, of some dampness due to some displacement of the insulation. It seems that this was due to some human agency, either the Appellants or some person present in the attic with their knowledge or authority. Dampness so caused would not be warranted.

The Tribunal holds that no part of the Appellants' claim is warranted. It regrets therefore that it must confirm the Corporation's decision.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

DONALD AND SUSAN BROAD

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
DON MACFARLANE, MEMBER

COUNSEL: DONALD AND SUSAN BROAD, appearing in person

CAROL STREET, representing the Respondent

DATE OF
HEARING: 6th September, 1984

REASONS FOR DECISION AND ORDER

The Tribunal finds, as it has in the past, that there is a distinction to be drawn between that which is major and that which is to be deemed minor, or at least less than major. For the Legislature would not have employed the word 'major' unless it had intended that word to be given some meaning.

Reluctantly the Tribunal finds that the Appellants failed to demonstrate a major structural defect in the first branch of their argument.

In respect of the second branch of their claim relating to the intended use of the building, the Tribunal has held in the past and continues to believe that the words "that materially and adversely affect the use of the building for the purpose for which it was intended" refer to the whole building, not just one room or one level.

The Tribunal is disappointed to be unable to allow this claim. The Tribunal wishes to record its appreciation for the forthright and candid manner in which the two professional witnesses gave their evidence. Mr. Broad's presentation which helped the case for the Appellants, was on a par with or better than we have experienced from professional counsel. If, at a subsequent date within the warranty period which has yet some time to run, fresh evidence to the effect that the problems complained of are due to soil subsidence beneath the footings, something which was not perhaps adequately canvassed at the hearing, we are sure the Warranty Program would reconsider its decision and the Tribunal would then be susceptible at a fresh hearing to a contrary conclusion.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

ASTON AND HAZEL BRYAN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WEARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
KENNETH VAN HAMME, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: ASTON AND HAZEL BRYAN, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 29th August 1984

REASONS FOR DECISION AND ORDER

The Appellants' claim is under the Ontario New Home Warranties Plan Act Section 14(1)(a) which reads in part as follows:

> " a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from....the vendor's failure to perform the contract; "

The Tribunal finds that the total contract between the parties are the documents: Exhibit 6, the Agreement of Purchase and Sale made up of four pages (inclusive of the Second Mortgage Agreement page 3 and Schedule "A"), Exhibit 7, the colour selection, and Exhibit 8 which the Tribunal finds was an amendment agreed to by the purchasers.

The Tribunal notes that page 2 of the Agreement of Purchase and Sale (Exhibit 6) paragraph 7 states:

> "...Included in the purchase price are the items and features listed on Schedule "A" which is attached hereto and forms part hereof. "

The Tribunal finds that the dwelling has been completed in accordance with the contract evidenced in writing. The completion had been in accordance with the terms ultimately settled upon. The mortgages were made available in accordance with the terms of the Offer.

The claimants alleged there was a further Memorandum in writing, not produced, that should form part of the contract and under which they were to obtain certain extras inclusive of a fireplace in the family room.

By way of verifying their argument that there was such an agreement in existence, they referred to the fact that certain extras, e.g. all brick exterior, all oak staircase, had been provided although not so specified in Schedule "A".

The vendor states that these items had been provided as upgrading of all homes as a sales promotion. The claimants do not rely on the upgrading as non-performance. They do rely upon non-performance of the other item of the unproduced Memorandum - that the fireplace was to be in the family room.

The Tribunal notes that the fireplace is shown on the Plan (Exhibit 21) in the family room as optional. Nowhere, however, is there any indication of the exercise of the option. It is uncontroverted that the Extras' Agreement (Exhibit 8) was signed by the purchasers with the concurrence of their solicitor. That is the Agreement that the vendor was bound to carry out as an amendment to the original Agreement of Purchase and Sale. The bargain of November 20th had been added to by Exhibit 8.

Accordingly the Tribunal finds that the claimants had no right to exercise the recission of the contract. The Tribunal finds that there was no failure by the vendor to perform the contract.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

CARLETON CONDOMINIUM CORPORATION NO. 111

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WILLIAM WATSON, MEMBER

COUNSEL: JANICE B. PAYNE, representing the Appellant

BRIAN M. CAMPBELL, representing the Respondent

DATE OF
HEARING: 7th May 1984 Ottawa

RULING - GRANTING ADJOURNMENT

Counsel for the Program, before the introduction of any testimony on behalf of the Appellant, indicated that he was seeking a stay of proceedings. The reason for this motion is that the Appellant has issued a writ and a statement of claim in the Supreme Court of Ontario, against the builder and others, claiming negligence and breach of warranty. Counsel for the Program submits that these issues are the very issues that the Tribunal must address, although in a more narrow and limited fashion, in order to decide whether or not there are major structural defects. Counsel for the Program asserts that the High Court action which is much more comprehensive in scope, should be proceeded with and concluded prior to a hearing before the Tribunal, and that if it is not, our more summary hearing of an included issue and our decision thereon, will extremely prejudice the Program's case.

Counsel for the Appellant disagreed that there was a duplicity of proceedings and argued that we are dealing with a different concept i.e. major structural defect, than the issues raised in the Supreme Court action. Counsel also argued that there is no indication in the legislation that a pending action in the Supreme Court of Ontario, or appropriate County Court, prevents the Tribunal from proceeding to hear evidence and to determine whether or not there is a "major structural defect" within the definition of the New Home Warranties Act.

The Tribunal is of the opinion that many of the questions raised, and points likely to be of issue, are identical in the two proceedings, although there is certainly a conceptual and legal difference between the onus of proving negligence and/or breach of warranty and the onus of proving a major structural defect. We find the Supreme Court of Ontario seized of this matter. Further we are of the opinion that the Supreme Court of Ontario action, which is more conprehensive, should be concluded prior to the appeal before this Tribunal.

Section 13(6) of the New Home Warranties Act states

> The warranties set out in subsection (1) apply notwithstanding any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

We are therefore of the opinion that this appeal should be adjourned sine die pending the conclusion of the Supreme Court of Ontario action.

We find it most unfortunate that the Appellant's counsel and the Registrar were not put on written notice by the Program's counsel of the nature of the Program's objection to the hearing.

HUGH DOHERTY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D. H. MACFARLANE, MEMBER

COUNSEL: HUGH DOHERTY, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 9th July, 1984

REASONS FOR DECISION AND ORDER

It seems to the Tribunal that the question in this case is not whether or not a problem exists, but whose responsibility it is to cure the problem. Is it the responsibility of the Warranty Program?

That responsibility can only arise from the statute which provides the warranty. In the view of the Tribunal the warranty given by the statute does not cover the present problem. Therefore it is not within the power and ability of this Tribunal to allow this appeal. The responsibility for repairing the problem - and it is a problem which ought to be repaired - resides with the home owner.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act therefore, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

FRANCIS M.P. AND M. FERNANDES

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: PATRICIA HENNESSY, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 2nd February, 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal determines as follows:

1. The Appellant was given notice of the Appointment For Hearing the 10th day of November, 1983, as evidenced by Exhibit 2 which contains the further Notice:

> "....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

4. There being no evidence placed before it in respect of the claim the Tribunal directs the Program to disallow the claim.

B.S. GERMENEY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: ROBERT SPENCE, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 17th, 18th, 21st and 22nd November 1983.

REASONS FOR DECISION AND ORDER

The factual situation herein is similar to that in re Rayner and in re Lockwood (Reasons for Decision and Order issued contemporaneously subject to variations (not relevant) of time and figures but with some differences. The Tribunal adopts the findings, reasons and rationale applied in re Rayner and in re Lockwood as applicable to that part of the factual situation herein of identical nature.

At the time of the reservation of the apartment on the 24th of December, 1980, the purchaser paid by cheque to Bookman & Associates in trust $1,000. On the execution of the Offer, a deposit cheque of $2,000 was made to Village East Properties Ltd.

The Tribunal notes that the Agreement of Purchase and Sale refers to a deposit of $3,000 'inclusive of deposit with reservation'. The Decision of the New Home Warranty Program of November 25th, 1982 stated (in addition to the already stated reasons respecting the balance):

> "In respect of the monies paid by you to Village East Properties on December 31, 1980, in the amount of $3,000.00, the Decision of the Warranty Program is that these monies constitute deposit monies pursuant to the provisions of the Act and Regulations."

The issue to be determined by the Tribunal is whether the moneys paid by the purchaser were deposits as defined in Regulation Section 1(1), i.e. "moneys received...by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.."

The Tribunal finds in the affirmative with regard to all monies paid.

At the time of the interim closing, Bookman and Associates per: 'S.M. Bookman' gave an undertaking to the purchaser "to hold the balance due on closing in trust and to deposit same in an interest-bearing term deposit in the name of Brian S. Germeney, pending the closing and transfer of title to the above-mentioned unit." The purchaser has made a claim for compensation to the Law Society; has not obtained judgment against the vendor. As in re Rayner and in re Lockwood, the Tribunal finds that these circumstances have no bearing on the determination of whether the monies paid were deposits which the Tribunal so finds.

The Tribunal finds that the purchaser is entitled to compensation by virtue of Section 14(1)(a), the limits being fixed by Regulation Section 6(1) and (2).

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to allow the claim in the amount of $20,000 with due interest on $3,000 from 31st December, 1980, and due interest on $17,000 from 26th February, 1981 pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act.

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

MARION GREEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN MORNINGSTAR, MEMBER
D.H. MacFARLANE, MEMBER

COUNSEL: PATRICIAN HENNESSY representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 1st February 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal determines as follows:

1. The Appellant was given notice of the Appointment For Hearing the 10th day of November, 1983 as evidenced by Exhibit 2 which contains the further Notice:

> "...if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

4. There being no evidence placed before it in respect of the claim the Tribunal directs the Program to disallow the claim.

F. HARRISON

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: F. HARRISON, appearing in person

BRIAN CAMPBELL, representing the Respondent

DATE OF HEARING: 31st July, 1984

ADJOURNMENT/UNDERTAKING

Now the Tribunal hereby adjourns the hearing sine die to be brought back on ten days' notice by the Registrar, to a date to be fixed by the Registrar in order to enable the Respondent to carry out its undertaking attached hereto.

UNDERTAKING

RE: F. HARRISON

July 31, 1984

The Warranty Program undertakes to repair, within sixty (60) days the entire garage floor and the east foundation wall (to be straightened) so that the same are in accordance with the standards and provision of the Ontario Building Code, at its expense by a Contractor satisfactory to both parties.

The work to be done under supervision of the Warranty Program's Consulting Engineer.

If the Appellant is not satified, he has the right to return to the Tribunal upon request within one year after completion of the work, to be designated in writing to the Appellant.

(Signature)
Brian Campbell
Solicitor for the Respondent

PATRICIA HEATH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: MICHAEL CHYKALIUK, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATES OF HEARING: 17th, 18th, 21st and 22nd November 1983

REASONS FOR DECISION AND ORDER

The factual situation herein is similar to that in re Rayner and in re Lockwood (Reasons for Decision and Order issued contemporaneously subject to variations (not relevant) of time and figures but with some differences. The Tribunal adopts the findings, reasons and rationale applied in re Rayner and in re Lockwood as applicable to that part of the factual situation herein of identical nature.

The parties disputed the amount of the claim in the following particulars:

(a) whether an initial deposit of $5,000 was paid at all;

(b) to whom any initial deposit was paid; and

(c) amount of money properly deducted as occupancy fee.

No direct evidence was placed before the Tribunal as to the payment and method of payment of $5,000 upon the execution of the Agreement of Purchase and Sale. The Tribunal notes that paragraph 2 of the Agreement refers to "inclusive of deposit with reservation" and the Tribunal finds (on the basis of entries in bank statements) that the said deposit was, regardless of the method and time of payment, converted to become a deposit received on behalf of the vendor upon the execution of the Agreement of Purchase and Sale and the subsequent pursuance thereof by the vendor.

Subsequent to the taking of possession by the purchaser, and upon an agreement with the mortgagee in possession by the purchaser subsequently, it was agreed that a lower rent would be paid than stipulated in the original Agreement of Purchase and Sale. The purchaser claims that the deposit monies claim should only be subject to the occupancy rent based on the revised occupation payment. The Tribunal is of the opinion that it is the amount that is stated in the Agreement of Purchase and Sale which is the relevant amount, and that any new arrangement with a third party subsequent to the events relevant to the claim by the purchaser against the vendor are not pertinent.

The Tribunal finds:

(a) $5,000 was initially received by or on behalf of the vendor from the purchaser;

(b) the payee is irrelevant in that the Tribunal finds that the $5,000 falls within the Regulation, Section 1(1); and

(c) The amount to be deducted is as set forth in the Agreement of Purchase and Sale.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to allow the claim in the amount of $15,000 plus due interest (if any) less occupancy rent as set out in the Agreement of Purchase and Sale pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

JAMES AND PATRICIA LAMONT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: PATRICIA LAMONT, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF
HEARING: 20th January, 1984

REASONS FOR DECISION AND ORDER

This was a claim for damages resulting from certain hairline cracks in a basement wall and for cracks in an outside near wall or an outside brick veneer cladding. The Tribunal has heard the evidence and concludes that the problem complained of is not warranted and therefore we are unable under the law as it stands to allow this appeal.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

BERNARD BRUCE LOCKWOOD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: A. MILLIKEN HEISEY, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF HEARING: 17th, 18th, 21st and 22nd November 1983.

REASONS FOR DECISION AND ORDER

The factual situation herein is similar to that in *re Rayner* (Reasons for Decision and Order issued contemporaneously), subject to variations (not relevant) of time and figures but with some differences. The Tribunal adopts the findings, reasons and rationale applied in *re Rayner* as applicable to that part of the factual situation herein of similiar nature.

The purchaser paid with the offer a deposit of $3,000.00 by cheque dated 31 December, 1980 to "Bookman & Associates in trust". The Tribunal is of the opinion that, under the circumstances, the monies were received on behalf of the vendor and is accordingly a deposit under Regulation 726, Section 1(1). Upon the execution of the Agreement of Purchase and Sale by its authorized signing official, S.M. Bookman, the vendor acknowledged that the $3,000.00 was received on behalf of the vendor; the vendor by its continuation of the purchase and sale confirmed the validity of the receipt post facto, just as a direction would, prior to issuance of the cheque.

Herein, at the time of the interim closing (at which time a 'Rayner' type direction was given and cheque for $21,500.00 issued accordingly), an undertaking was given by Bookman & Associates as follows:

> "In consideration of and notwithstanding the interim closing of the above referred to transaction the undersigned hereby undertakes as follows:
>
> To hold the balance due on closing in trust and to deposit same in an interest bearing term deposit in the name of BERNARD BRUCE LOCKWOOD and VILLAGE EAST PROPERTIES LIMITED, pending the closing of and the transfer of title to the above-mentioned unit.
>
> On behalf of our client, Village East Properties Limited, we also undertake to pay any and all interest accruing at the prescribed rate from the date of occupancy to the date of transfer of title to the purchaser and to adjust the same on final closing.
>
> Dated at Toronto this 9th day of March, 1981.
>
> BOOKMAN & ASSOCIATES
> per
>
> 'S.M. Bookman'"

At the time of forwarding the Deposit Receipt to the solicitors for the vendor on the 31st of March, 1981, there was stated on behalf of the purchaser "as the receipt covers the deposit up to $20,000 only, we trust that you will retain the amount over and above this already paid by our client, in trust in accordance with your undertaking given on closing".

The Tribunal is of the opinion that the undertaking, the wording and format thereof, to hold and deposit the monies paid on the interim closing in an interest-bearing term deposit, upon the terms set out in the undertaking, does not affect the nature of the monies as being a deposit. To hold otherwise would be incongruous, in that a purchaser who sought such additional protection would be penalized. The Tribunal is further of the opinion that the letter of March 31st, 1981, also does not affect the nature of the monies paid as deposit.

The Tribunal is of the opinion that the monies paid on the interim closing were, under the circumstances, deposits in that they were received on behalf of the vendor from the purchaser on account of the purchase price within the meaning of Regulation Section 1(1).

The Tribunal notes that the purchaser has not made an application to the Compensation Fund of the Law Society of Upper Canada. The Tribunal is of the opinion that such inaction is not relevant to the determination of a claim under the Ontario New Home Warranties Plan Act which is an entitlement granted by the Legislature provided that the provisions of the Act are met. The Tribunal is of the opinion that not obtaining a judgment is not relevant.

The Tribunal notes the statement of the Respondent,

> " The Warranty Program has concluded its review of the claims that it has received from the purchasers of the Jarvis Mews condominiums and submits that a determination of your claim can be made at this time."

The sale was not completed. In this regard the Tribunal finds that the vendor failed to perform the contract.

The issue to be determined by the Tribunal is whether the moneys paid by the purchaser were deposits as defined in Regulation Section 1(1), i.e. "moneys received...by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.."

The Tribunal finds in the affirmative with regard to all monies paid.

The Tribunal finds that the purchaser is entitled to compensation by virtue of Section 14(1)(a), the limits being fixed by Regulation Section 6(1) and (2).

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program to allow the claim in the sum of $20,000 and due interest from 9th March, 1981 pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

ELAINE MARTIN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT.

TO DISALLOW THE CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
JOHN HURLBURT, MEMBER

COUNSEL: PATRICIA HENNESSY, representing the Respondent

No one appearing for the Appellant

DATE OF
HEARING: 5th April, 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal determines as follows:

1. The Appellant was given notice of the Appointment For Hearing the 5th January, 1984, as evidenced by Exhibit 2 which contains the further Notice:

> "...if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

4. There being no evidence placed before it in respect of the claim the Tribunal directs the Program to disallow the claim.

JANET MARTIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: JANET MARTIN, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 18th May 1984

REASONS FOR DECISION AND ORDER

The Appellant purchased a house in May of 1979 and immediately began to experience gross inconvenience arising from structural defects in that water entered the basement rec room, pouring down the chimney. The situation was brought to the attention of the builder but to no avail. The Warranty Program was contacted in November and a conciliation report was delivered early in December. This conciliation was agreed to by the owner. The work was frustrated for the duration of the winter by reason of frost. In the spring or early summer the Warranty Program wrote to the owner authorizing the necessary work as per the agreement reached at the conciliation meeting and asked her to contact the Warranty Program. The letter reads as follows:

> Please be advised that the Warranty Program has sent your builder final notice to complete the items of warranty on your home. If you should fail to heat from your builder or if the work is not being attended to you are instructed to contact the writer after July 16th, 1980 by calling 494-4421 leaving a message in that regard. If your builder does respond please notify the writer immediately.

The owner Appellant alleges she did not receive that letter notwithstanding that she received numerous other letters from the Warranty Program at the same address. The Warranty Program heard nothing further from the owner. Two and a half years later the owner Appellant confronted the Warranty Program with an invoice for some $1,469.37 to cover remedial work performed on July 8th, 9th and 10th, 1980 by contractor engaged by her without consultation with the Respondent. The Warranty Program at first refused this claim and later agreed to pay $700.00. Its refusal to pay the invoice in full could be defended on the following grounds:

> 1. That the invoice might have been for work more than necessary to cover the defects and deficiencies warranted and for which the guarantee fund would be lawfully liable, e.g. certain items of landscaping.
>
> 2. The Warranty Program ought to have been permitted to supervise the work and to choose a contractor of its own choice if it felt the estimate excessive.
>
> 3. That its ability to obtain reimbursement from the builder for loss sustained the guarantee fund had been compromised by the unnecessary and unexplainable delay occasioned by the Appellant in not notifying the Respondent over the full period of two and one-half years which she unaccountably permitted to elapse.

The Tribunal has deliberated the issues raised and concludes the case presented by the Warranty Program is the better of the two. Neither side has performed perfectly but in the circumstances the Tribunal finds that the Warranty Program's offer of $700.00 is fair.

Accordingly and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to allow the claim in part - to wit, it directs the Respondent to pay to the Appellant the amount of its original settlement offer being the sum of $700.00.

WALTER H. AND ELIZABETH K. McEACHERN

APPEAL FROM A THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: STEPHEN W. PETTIPIERE, representing the Appellants

BRIAN M. CAMPBELL, representing the Respondent

DATE OF HEARING: 7th August, 1984

DIRECTION

That Counsel make written submissions as to law.

This matter has raised two significant issues.

On the assumption that the Tribunal were to find that in respect of the plastering job the home is not constructed in a workmanlike manner and is not free from defects in material, and on the assumption that there is no major structural defect the question still remains whether the Claimant is entitled. There is the claim of the Appellants as set out in the letter dated January 1, 1983 and as one would expect from a layman it is a general complaint and a general claim. The decision of HUDAC deals with the matter as if it were a consideration of a claim for a major defect. And it would appear that HUDAC's position is that if the damage was not because of a major structural defect that is an end to the matter and the claim cannot be made. It is in respect of that position that the Tribunal invites written submission on behalf of the Claimant and a reply on behalf of the Respondent.

Mr. Campbell also has raised very briefly that there was a Conciliation Report and accordingly the Claimant's remedy is to be sought elsewhere. He cited the Tribunal's decision in Re: Gracien St. Onge.

The Tribunal has before it, a report of the Ombudsman's opinion and Reasons therefor and recommendations following his investigation into the complaint of one Mr. Norman Jaye respecting a Ruling by the Tribunal that it had no jurisdiction in his matter because of its Ruling in Re: Gracien St. Onge respecting its lack of jurisdiction in the situation. In conjunction with that investigation the Chairman gave assurance that the recommendations of the Ombudsman will be circulated to the members of the Tribunal for their consideration in similar circumstances. That investigation is commented upon by the Ombudsman in the Annual Report 1983-84, Volume 1, pages 15, 20 and 21. Both items will be made available to Counsel that they may be commented upon and submissions made in the second part of the written submission.

The procedure that will be followed subject to further representation to and consideration by the Tribunal is that Counsel for the Claimants will make his submission in those two parts as I have stated. There will be a reply by Mr. Campbell. Then Counsel for the Claimants will have an opportunity of commenting upon the reply, should that evince any significant points counsel for the Claimants may wish to comment on.

The sequence will be: twenty days within which the counsel may file, the Respondent ten days for reply and ten days for response thereto.

The above Direction was issued after oral argument; the hearing not being concluded. Subsequently the Appellants withdrew the request for a hearing.

SUSAN MYSLICKI

APPEAL FROM THE DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: PATRICIA HENNESSY, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 15th May, 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal determines as follows:

1. The Appellant was served with the Notice of the Adjournment dated November 17th, 1983, as evidenced by Exhibit 3 setting the date of the hearing to May 15th, 1984.

2. The Appellant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

4. There being no evidence placed before it in respect of the claim the Tribunal directs the Program to disallow the claim.

GRETHE NIELSEN and
JAKOB TOM NIELSEN

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D. H. MAC FARLANE, MEMBER

COUNSEL: WILLIAM J.F. BISHOP, representing the Appellants

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 10th August, 1983

REASONS FOR DECISION AND ORDER

The claims of Jakob Tom Nielsen and Grethe Nielsen, brother and sister, arose within the same circumstances and were heard together. Each was for the sum of $20,000, the maximum amount of compensation which may be claimed under the Act and the two claims together were for a neat $40,000. At the conclusion of argument the Tribunal announced its decision, which was to totally disallow the claims in accordance with the decision of the Warranty Program appealed from, and it undertook to deliver Reasons for Decision later on, which now follow herewith.

Essentially the case involves a family situation. The father was Arne Nielsen, in effect the proprietor of Arne Nielsen Construction Limited. He was the major shareholder and principal executive of it although not the sole shareholder - Jakob Tom, his son, held at least one share. At the time of the events under consideration Arne Nielsen Construction was the builder of a condominium project known as Marina City Landmark (or "The Landmark") at Kingston, Ontario, and the vendor of certain condominium units therein located (and to whom we shall refer from time to time in these Reasons as "the Vendor"). The mother was Sonja Nielsen and she was in effect the proprietor of Sonja Nielsen Real Estate Company Ltd, the

Registered Broker with whom the condominium units of the project were listed for sale. The claimant Grethe Nielsen was the daughter of Arne and Sonja Nielsen and she was a registered salesman employed by the Sonja Nielsen Real Estate Company and she worked in connection with the project. The claimant Jakob Tom Nielsen, as stated, was a shareholder of Arne Nielsen Construction Limited but did not appear to be actively engaged in the management or operation of its affairs or activities and we assume his principal employment was elsewhere and separate.

Both claimants had contracted to acquire condominium units in the Landmark project from the Arne Nielsen Construction Company as vendor for the ostensible purpose of residential occupancy. In each case these purchase contracts were frustrated by what happened, namely by the mortgagee exercising its right of power of sale thereby divesting the vendor of its ability to effect conveyance.

This unfortunate development then triggered the filing by the claimants of Proof of Claim forms with the HUDAC New Home Warranty Program, Ontario New Home Warranties Plan. The Proof of Claim - Part D filed on behalf of Jakob Tom Nielsen referred to a deposit receipt issued to him on October 19, 1981 as No. 46389 respecting a Purchase Agreement dated December 14, 1979 with the Vendor registered as No. 4045-4140.

Paragraph 4 of the said Proof of Claim - Part D completed and filed by or on behalf of the male claimant reads as follows:

> 4. Date and amount of each case deposit made by Claimant under the Purchase Agreement:
>
> Initial deposit
> October 19, 1981....$20,000.00 - By Note
> Second deposit
> October 30, 1981....$48,368.16
> Third deposit
> October 30, 1981....$10,000.00

The Proof of Claim - Part D filed on behalf of Grethe Nielsen referred to a deposit receipt issued to her on October 19, 1981 as No. 00546 respecting a Purchase Agreement dated December 14, 1979 with the Vendor registered as No. 079266 and did also recite an Enrollment No. 4045-4053. In the case of the Proof of Claim - Part D filed by or on behalf of Grethe Nielsen the 4th paragraph reads as follows:

4. Date and amount of each cash deposit made by Claimant under the Purchase Agreement:

Initial deposit
    October 19, 1981....$20,000.00 - by Note
Second deposit
    December 7, 1981....$60,000.00
Third deposit
    January 11, 1982....$ 5,000.00
    January 22, 1982....$ 5,000.00

Further questions and answers on the face of each of the Proof of Claim forms - Part D disclose that the Vendor was not bankrupt although in financial troubles and was unable to close the transactions as the property was "under control of mortgagee". Question 7 "what efforts have been made by the claimant to recover the deposit(s) paid to the Vendor" was answered by the words "recently instructed solicitor to sue for return of funds." (That action was discontinued on the day of the Hearings.)

It is interesting to note at this point that the two deposit receipts issued to the claimants by the Vendor on the Warranty Program's form referred to in the above claim forms were each in the sum of $20,000; interesting for two reasons, firstly because the Agreements of Purchase and Sale between the vendor and the claimants did not create any obligation upon the claimants as purchasers to deposit any such amount or amounts but rather Tom's agreement with the vendor called for a deposit in the precise amount of $8,150 and Grethe's for a deposit of exactly $7,950, and each deposit was to be made by cash or certified cheque. Secondly, because although the deposit receipts issued by the Vendor to the Purchasers - by the father to his two children - purported to be in the sum of $20,000 each, a sum equal to the maximum amount recoverable by anybody in any circumstances under the Act, nowhere on either of those documents, which were presented for signature and duly signed by the Respondent's signing officers, is there any note that the deposit in question, the deposit which is being receipted, was not a deposit as called for in the Agreements of Purchase and Sale namely a deposit made by means of either cash or certified cheque. Nowhere does it appear in either receipt that the deposit whether it was a deposit for the amount called for in the Agreements of Purchase and Sale or the amount stated on the face of the said receipts was for nothing more or less than a mere promissory note.

So there are two points which appear highly irregular at the outset. One is that the amount alleged to have been deposited in respect of each claim was much more than the person making the deposit or allegedly having made the deposit was under any legal obligation to make. The second is that the amount alleged to have been deposited was not deposited in cash or by certified cheque but rather by promissory note. In other words, the discrepancy was one not only as to the amount deposited but also as to the means by which it was deposited. The amount was considerably greater than the amount contractually required and the means by which it was allegedly paid was a means very much easier and simpler, namely a promissory note as opposed to cash or certified cheque.

Now all this tends to arouse the suspicions of the Tribunal that the parties were not dealing at arms' length and were not dealing in a bona fide manner with the Warranty Program. Indeed, the impression is created that the contracting parties were cooking up some arrangement whereby the provisions of the Ontario New Home Warranties Plan Act could be twisted or stretched in contravention of its purpose and intention, which is an intention to protect members of the consuming public, so as to provide a degree of protection for them which would never be available to a purchaser who is dealing with a vendor who is a stranger to him in an arms' length transaction which was being conducted in a bona fide manner.

An example of what we may describe as the "cute" or somewhat tricky modus operandi of these people would be the instrument known as Grant of First Right to Purchase Proposed Condominium Unit filed in respect of each of the two claims. On its face this instrument recites that the total purchase price will be $81,500 for the unit proposed for the male claimant and $79,500 for the unit proposed for the female claimant and furthermore that "the sum of $2,000 [in each case] paid on the execution of this Agreement, and interest thereon as provided herein, shall be credited to the Purchaser on account of the said total purchase price;..." We then find that this "deposit" of $2,000 was in fact nothing more than the giving in each case of a promissory note for $2,000 which is only payable "on the closing of said transaction". That is not a deposit. That is a sham.

The $20,000 promissory notes were not "payable only on the date of closing or in the event of closing" but were equally deficient to serve as deposits within the meaning of that word. So the deposit receipts issued in respect of them are null and void inasmuch as the Warranty Program whose officers purported to sign the same were not aware of the nature of such deposits.

Later on, when the condominium project ran into difficulties it appears that both the male and female claimants advanced substantial sums of money to their father's company. These sums were said to have been the proceeds of the sales by them of their former apartment abodes. This may be so or perhaps not - it is irrelevant what the source of their funds were. Grethe Nielsen appears to have given her father's company, the Vendor, $60,000 on December 7, 1981 and Tom appears to have given his father's company the sum of $48,368.16 on October 30, 1981. In each case these payments were alleged to have further fed the claimants' entitlement to recovery out of the Guarantee Fund. It is as though if the $20,000 deposit made by promissory note were not sufficient then the subsequent payment made at a much later date and as the Tribunal believes in entirely different circumstances and for an entirely different purpose, was sufficient to constitute a deposit as evidenced by the deposit receipt.

The Tribunal in reviewing the facts as determined from the evidence concludes that the amount required to be deposited by the two Agreements of Purchase and Sale was never in either case actually paid either in the quantum called for by the Agreements or in the manner called for by the Agreements. It holds that the deposit receipts each in the amount of $20,000 were improperly issued by the Vendor whether acting as agent for the Respondent Corporation, the New Home Warranty Plan, or otherwise.

Counsel for the claimants argued that the Corporation was liable to pay the amounts claimed out of the compensation fund whether the deposit receipts were properly issued or not and that this was because the Vendor had authority to issue them which the Corporation could not deny and that the Corporation was therefore bound by the common law of agency; bound to the resulting benefit of these claimants. This might possibly be true in the case where a third party were involved. that is to say where an agent in improper exercise of his authority could bind his principal in an obligation to a bona fide third party. However, where a less than honest agent creates what appears to be an obligation in favour of his children, who are not bona fide third parties at all but individuals with whom he has entered into a collusive and improper arrangement, the common law of agency does not bind the principal. Nor is the Respondent bound on the facts of this case, which come at least close to fraud.

The Ontario New Home Warranty Program is intended to protect members of the public from certain perils of which they might otherwise be the innocent victims. It is consumer legislation. From time to time the compensation funds established by this and other pieces of consumer legislation enacted by the Legislature of Ontario are attacked by predatory business people who wish to twist it to cover business losses. The Tribunal's function is to prevent that from happening and that is why the Appellants' claims were dismissed and disallowed by the Tribunal's decision which was delivered at the conclusion of the Hearing and hereby confirmed in these Reasons.

That is to say, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Corporation established under the HUDAC New Home Warranty Program to reject these claims and confirms its direction that they be disallowed.

H.A. PADWICK

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: H.A. PADWICK, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 28th August, 1984

REASONS FOR DECISION AND ORDER

The Applicant is claiming on the basis of a major structural defect in respect of certain cracks in basement walls through which water has on occasion seeped, and in respect of a settlement of a garage floor as a result of which ponding occurs.

The Tribunal finds that there did develop the cracks as set out in Numbers 1 to 5 on Plan Exhibit 11 and that water has seeped through the cracks shown as Numbers 1, 3 and 4. The Tribunal finds that the cracks are fine, and that there is no deflection in respect thereof. The Tribunal finds that there is a settlement in the garage floor and that ponding does result.

Since the claim was made beyond one year, in order to succeed the Appellant must demonstrate his claim is valid because of the existence of a major structural defect as defined in Regulation 726 Revised Regulations of Ontario, Section 1, paragraph (o) namely (and as has been discussed very thoroughly by the claimant).

Upon the evidence before it, the Tribunal finds that:

a) There has been no failure of any load-bearing portion of the building nor has its load-bearing function been materially and adversely affected (and the claimant did not pursue this). No direct evidence in this regard was placed before the Tribunal.

b) The cracks do not come within the above inclusion "major cracks in basement walls". The cracks are fine. The fact that water seeps through to the degree described leaving stains after the occasions of rainfall does not indicate a "major crack".

c) The dampness, such as it is, comes within the above exclusion for it is not that arising from a failure of a load-bearing portion of the building. As stated above, such a failure has not been found by the Tribunal.

d) The seepage of water through the crack is not such as to materially and adversely affect the use of the home - those portions referred to - for the purposes for which they were intended. They continue to be used for storage and playroom; indeed part of the basement has been converted to a bedroom even though the home was purchased with an unfinished basement.

The claimant has suggested that the words "material" should be interpreted as equal to "not immaterial" and that the word "adverse" should be interpreted as anything not being in the interests of the claimant. Such an interpretation would as a concept give basis for a valid claim in all instances. However, the Tribunal has had occasion to go into detail on the significance of the words "material" and "adverse" and the requirement is beyond that as is conceived by the claimant. The smell which has been described as slightly musty is not such as to make the condition of the basement materially or adversely affected in its use.

The claimant has made a submission related to the kind of wall that is required in a dwelling - one that would hold back water. Such does not come within the definition of a major structural defect. The Tribunal has had to deal with many occasions in which water has in fact come through the walls; the Tribunal is of the opinion that the submission put forward by the claimant has no validity having in mind the exact language of the legislation.

The same findings are in respect of the garage floor. With respect thereto, in addition to the issues dealt with in respect of the basement wall, the claimant has stressed the words "including significant damage due to soil movement". The Tribunal is of the opinion that the damage exemplified by the subsistence that he has placed before the Tribunal is not such as to be considered significant within the meaning of the

Section read as a whole, a Section designed to cover conditions beyond that which exist in respect of this home. In respect of use, the garage is used in the ordinary course, e.g. for storage of household items and a car. The condition of ponding whether induced by rain or otherwise and the freezing thereof in the winter time is not such as to materially and adversely affect the use of the garage for the purpose for which it was intended.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

DURGADAS PATNAIK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
STEPHEN PUSTIL, MEMBER

COUNSEL: DURGADAS PATNAIK, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 23rd February, 1984

REASONS FOR DECISION AND ORDER

The Appellant Durgadas Patnaik appeals from a decision of the New Home Warranty Program (hereinafter referred to as the Program) disallowing a claim for damages.

The decision of the Program filed with the Tribunal was delivered by registered mail to the Appellant on August 25th, 1982, in which the Program ruled that there was not a major structural defect.

The Appellant's Proof of Claim filed, it would appear in June of 1982, alleged the existence of cracks to the exterior and interior of the dwelling. The Tribunal had the opportunity of observing the cracks from photographs depicting the exterior cracks which the Appellant claimed were the widest.

No evidence of a professional or expert nature was called by the Appellant to indicate that the load-bearing structure is affected or that the damage in question materially and adversely affects the use of such for the purpose for which it was intended.

To succeed before the Tribunal the Appellant must establish the existence of a major structural defect as defined in Section 13 of the Regulations to the Statute.

We find that there is no evidence that the load-bearing structure is affected. We find no evidence that the use of the building or basement area is materially and adversely affected as to the purpose for which it is intended.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

BARRY RAYNER

APPEAL FROM DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW CLAIMS

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: GRANT J. KENNEY, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 17th, 18th, 21st and 22nd November 1983.

REASONS FOR DECISION AND ORDER

The Tribunal finds:

1. Barry Rayner (purchaser) entered into a valid Agreement of Purchase and Sale, with Village East Properties Limited (vendor), pertaining to unit 20 of an unregistered condominium project (see Exhibit 33, tab 1), which was accepted 31st December, 1980.

2. The condominium project was enrolled with HUDAC on the 10th day of December 1980.

3. The purchaser paid with the offer to Village Properties Ltd. (sic - emphasis Tribunal's) the sum of $3,000.00 in respect of the aforesaid condominium unit through a cheque dated 30th December, 1981 for an aggregate figure of $6,000.00 for 2 units (33 and 20) (see Exhibit 33, tab 3).

4. The solicitors acting for the vendor was the firm of Bookman & Associates. The firm was that of Steven M. Bookman and he was its principal.

5. The principal shareholder and sole officer of the vendor is the same Steven M. Bookman.

6. The solicitors acting for the purchaser were the firm of Perkins and Ballard.

7. The purchaser was to obtain interim possession of the condominium unit on March 23, 1981, upon payment of the sum of $18,581.00. An interim closing was scheduled between the purchaser and the vendor.

8. The vendor (Exhibit 33, tab 5) authorized and directed the making of "the proceeds payable on the interim closing....to Bookman & Associates in trust, or as they may further direct" (Exhibit 33, tab 7). The direction was executed by "Village East Properties Limited per: 'S.M. Bookman'." The Agreement of Purchase and Sale had been executed by the vendor "as vendor by its authorized signing official 'per S.M. Bookman'."

9. The cheque for $18,581.00 dated 19th March, 1981 was issued to the order of "Bookman & Associates, in trust/Re Rayner purchase Unit 20".

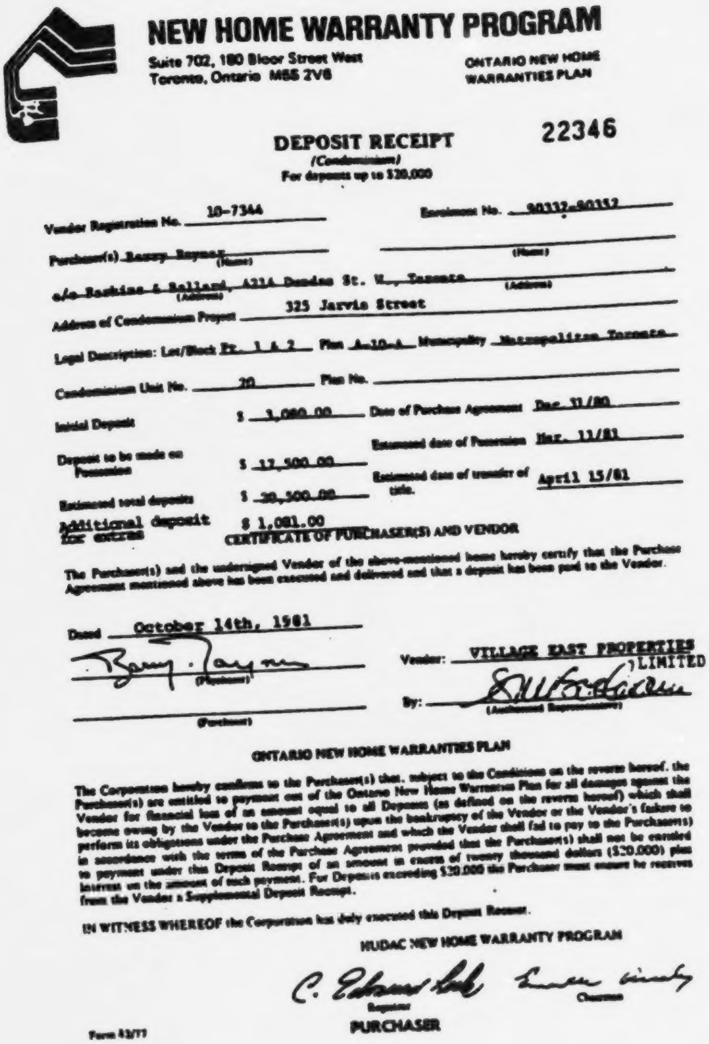
10. The solicitors for the purchaser confirmed the undertaking of the solicitors for the vendor to "hold the funds in escrow pending delivery of a HUDAC enrollment and the requisite deposit receipt".

11. The vendor was registered with the hUDAC New Home Warranty Program under vendor registration #10-7344.

12. The solicitors for the vendor notified the solicitors for the purchaser of registration of the condominium by letter dated October 8, 1981.

13. The New Home Warranty Program issued a deposit receipt #22346 dated October 14th, 1981 with an enrollment No.

The Tribunal notes without comment the format of the Deposit Receipt as reproduced herein:



NEW HOME WARRANTY PROGRAM

Suite 702, 180 Bloor Street West
Toronto, Ontario M5S 2V8

ONTARIO NEW HOME
WARRANTIES PLAN

DEPOSIT RECEIPT

22346

(Condominium)
For deposits up to $20,000

Vendor Registration No. 10-7344 Enrolment No. 90332-90352

Purchaser(s) Barry Rayner (Name) ______ (Name)

c/o Raskins & Ballard, 421A Dundas St. W., Toronto (Address) ______ (Address)

Address of Condominium Project 325 Jarvis Street

Legal Description: Lot/Block Pt. 1 & 2 Plan A-10-A Municipality Metropolitan Toronto

Condominium Unit No. 20 Plan No. ______

Initial Deposit	$ 3,000.00	Date of Purchase Agreement	Dec. 31/80
		Estimated date of Possession	Mar. 11/81
Deposit to be made on Possession	$ 17,500.00	Estimated date of transfer of title.	April 15/81
Estimated total deposits	$ 20,500.00		
Additional deposit for extras	$ 1,081.00		

CERTIFICATE OF PURCHASER(S) AND VENDOR

The Purchaser(s) and the undersigned Vendor of the above-mentioned home hereby certify that the Purchase Agreement mentioned above has been executed and delivered and that a deposit has been paid to the Vendor.

Dated October 14th, 1981

Barry Rayner
(Purchaser)

______
(Purchaser)

Vendor: VILLAGE EAST PROPERTIES LIMITED

By: ______
(Authorized Representative)

ONTARIO NEW HOME WARRANTIES PLAN

The Corporation hereby confirms to the Purchaser(s) that, subject to the Conditions on the reverse hereof, the Purchaser(s) are entitled to payment out of the Ontario New Home Warranties Plan for all damages against the Vendor for financial loss of an amount equal to all Deposits (as defined on the reverse hereof) which shall become owing by the Vendor to the Purchaser(s) upon the bankruptcy of the Vendor or the Vendor's failure to perform its obligations under the Purchase Agreement and which the Vendor shall fail to pay to the Purchaser(s) in accordance with the terms of the Purchase Agreement provided that the Purchaser(s) shall not be entitled to payment under this Deposit Receipt of an amount in excess of twenty thousand dollars ($20,000) plus interest on the amount of such payment. For Deposits exceeding $20,000 the Purchaser must ensure he receives from the Vendor a Supplemental Deposit Receipt.

IN WITNESS WHEREOF the Corporation has duly executed this Deposit Receipt.

HUDAC NEW HOME WARRANTY PROGRAM

Registrar Chairman

PURCHASER

Form 43/77

(Note: Both signatures printed)

And on the reverse side thereof, inter alia:

"

CONDITIONS

1. INTERPRETATION

1.1 Definitions - In this Deposit Receipt, unless the context otherwise requires, the following expressions shall have the following meanings:

(d) "date of transfer" means the date on which the Deposits are applied on account of the purchase price payable under the Purchase Agreement with respect to the home.

(e) "Deposits" means, in respect of the home, all moneys received before the date of possession by or on behalf of the Vendor from the Purchaser on account of the purchase price payable under the Purchase Agreement, and includes moneys received by or on behalf of the Vendor after the date of possession and prior to the date of transfer but does not include moneys

(i) paid under the Purchase Agreement as rent or as an occupancy charge and not part of the purchase price, or
(ii)specified in the Purchase Agreement not to be credited against the payment of the purchase price pursuant to the provisions of sub-section 6 of section 24a of The Condominium Act.

(g) "Interest" means interest at the rate or rates prescribed under The Condominium Act, to be paid by the Vendor to the Purchaser on Deposits.

1.3 Headings - The insertion of headings is for convenience of reference only and shall not affect the construction or interpretation of this Deposit Receipt.

2. PAYMENT OUT OF THE PLAN

The Corporation confirms to the Purchaser that, if Deposits shall become owing to the Purchaser upon the bankruptcy of the Vendor or upon the Vendor's failure to perform its obligations under the Purchase Agreement and if the Vendor shall fail to pay the same or any part thereof to the Purchaser in accordance with the terms of the Purchase Agreement, the Purchaser shall be entitled to payment out of the Plan for all damages against the Vendor for financial loss of an amount equal to such Deposits plus Interest provided that, in no event, shall the Purchaser be entitled to payment under this Deposit Receipt of an amount in excess of twenty thousand dollars ($20,000) plus Interest on the amount of such payment.

5. TERM OF DEPOSIT RECEIPT

This Deposit Receipt shall become effective when executed by the Purchaser and the Vendor and shall remain in full force and effect until the earliest of:

(a) The date of transfer;

(b) the termination of the Purchase Agreement and the payment by or on behalf of the Vendor to or on behalf of the Purchaser of all Deposits due to him; or

(c) the payment out of the Plan of all Deposits, plus Interest due under any claim arising from the bankruptcy of the Vendor or the Vendor's failure to perform its obligations under the Purchase Agreement, written notice of such claim having been given as required by paragraph 3.1 hereof. "

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14. By letter dated June 1, 1982, the now solicitors for the vendor (Wise, Kesten, Clarke, counsel: Steven M. Bookman) advised the solicitors for the purchaser that the vendor "is presently in an insolvent position and is not capable of transferring title".

15. The Purchaser was granted Judgment against the vendor on the 6th day of April, 1983 for $21,581.15.

16. On the 3rd day of June, 1982, the purchaser provided to HUDAC New Home Warranty Program a proof of claim form together with a "Statement of Occupancy" to support a claim for reimbursement of deposit.

17. By letter dated January 28th, 1983, HUDAC New Home Warranty Program advised the purchaser of its decision:

> " It is the decision of the Warranty Program that the monies that were paid by you to Bookman and Associates in trust (sic) in the amount of $16,465.25 do not constitute deposits in accordance with the provisions of the Ontario New Home Warranties Plan Act and its Regulations.

> It is the opinion of the Warranty Program that your claim for the refund of the monies that were paid to Bookman and Associates, in trust would be more appropriately made to that firm or to the compensation fund of the Law Society of Upper Canada."

The issue to be determined by the Tribunal is whether the moneys paid by the purchaser were deposits as defined in Regulation, Section 1(1), i.e. "moneys received...by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement.."

The Tribunal finds in the affirmative with regard to all monies paid.

The Tribunal finds that the $3,000.00 (part of $6,000.00 paid [under an erroneous name] directly to the vendor) as a deposit under the agreement was a deposit received by the vendor from the purchasers, the exact description of the payee being of no effect for the cheque was honoured for the vendor.

The Tribunal finds that the balance paid on the interim closing pursuant to the direction of the vendor was moneys received on behalf of the vendor from the purchaser. Such a transaction is a common one in the ordinary course of the completion of the purchase and sale of real estate.

The Tribunal is of the opinion that the fact of an application being made to the Compensation Fund of the Law Society of Upper Canada is not relevant to a claim under the Ontario New Home Warranties Plan Act which claim must stand or fall upon its own merits under the Act.

The Tribunal is of the opinion that the obtaining of a judgment does not invalidate the claim.

The sale was not completed. In this regard, the Tribunal finds that the vendor failed to perform the contract.

The Tribunal is of the opinion that the reasons of the New Home Warranty Program for disallowing the claim have no validity.

The Tribunal finds that the purchaser is entitled to compensation by virtue of Section 14(1)(a), the limits being fixed by Regulation Section 6(1) and (2).

The above applies with necessary adjustment to the claim respecting Unit 33.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act,

The Tribunal directs HUDAC New Home Warranty Program:

In respect of Unit #20 to allow the claim in the sum of $20,000 plus interest on $3,000 from 30th December, 1980, plus interest on $17,000 from 19th March, 1981 pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act; and

In respect of Unit #33 to allow the claim in the sum of $16,465.25 plus interest on $3,000 from 30th December, 1980, plus interest on $13,465.25 from 19th March, 1981 pursuant to Section 53 of the Condominium Act and Section 33 of Regulation 121 of the Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently abandoned.

LORNE F. SAMUEL

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WEARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: LORNE F. SAMUEL, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 24th August 1984

REASONS FOR DECISION AND ORDER

This was an appeal from the Respondent's Decision to refuse the Appellant's claim for the repayment of $2,000 out of the Compensation Fund established under the Ontario New Home Warranty Plan Act by way of reimbursement or refund of a deposit made by him pursuant to the terms of an Agreement of Purchase and Sale entered into by him in respect of a certain new home.

The Agreement of Purchase and Sale called for the transaction in question to be closed on or before September 15th, 1981. It also provided that if construction of the dwelling were not completed by the designated closing date the Vendor should be permitted an extension or extensions of time not exceeding 90 days. The date for completion was in fact advanced, on consent of both parties as evidenced by an amending agreement filed as Exhibit 8B to these proceedings, to Februrary 22, 1982. However, the transaction was not closed on that date nor was it ever closed.

The principle issue to be determined by the Tribunal was whether this non-completion of the Agreement of Purchase and Sale was something for which the Vendor was responsible or whether it was something for which the purchaser, the Appellant-Claimant was responsible. Or, again, whether it was due to causes for which the Appellant was partially if not fully responsible.

It is the opinion of the Tribunal that a claimant in a case such as this who seeks to receive a payment out of the Compensation Fund established under the provisions of the Ontario New Home Warranty Plan Act which is consumer legislation must prove his claim and in so doing demonstrate that he is in no way the author of his own misfortune and be able to successfully rebut any suggestion that the loss in question was due to something done or improperly omitted by him.

In this case and upon a careful assessment of the evidence the Tribunal finds that the Appellant has failed to entirely convince it that he was 100% desirous at all material times to complete the transaction or to complete it on the dates variously designated or fixed for closing. Nor is the Tribunal fully or adquately convinced that the Appellant-Claimant demonstrated sufficient zeal in his efforts to pursue and recover his $2,000 deposit.

There is evidence that the rates of interest charged on mortgages during the time or time frame under consideration were fluctuating up and down and approaching historically high levels. We consider it possible that the Appellant's conduct was somewhat indecisive throughout this period because he perceived some advantage from "keeping his options open".

We believe that a person keenly interested in closing this transaction or in recovering back his deposit would have acted more positively - especially when he happened to be a fully qualified solicitor in active practice in the Province of Ontario as is Mr. Samuel.

Why didn't he tender on the last date for closing? Why was not the dispatch of the letter which he sent demanding a return of his deposit on February 23, the day after the last date fixed for closing better recorded? Why was it not sent by registered mail or why was no copy retained either in a solicitor's letter book or in a file? And why did Mrs. Glazer the vendor's responsible employee deny that such a letter was ever received? Again, why did the Appellant fail to institute an action to recover the $2,000 or file any claim in the vendor's bankruptcy proceedings which later took place?

The Appellant's claim has been attended by confusion, unaccountable lapses of memory, and subsequently detected errors in his recollection of events. He is not a feeble or disadvantaged person - as a solicitor he is in the opposite position and a high standard of proof is required, a higher standard than he has demonstrated in the presentation of this claim.

We suspect that, whether he intended at any time to live in this house or not, the aquisition of the property was at least in part a speculative investment on the part of the Appellant which as things turned out he was inclined to walk away from accepting the loss of the $2,000 deposit as a write-off. It is interesting to note that he closed the purchase of another home where he presently resides earlier than on the last date designated for the closing, to wit earlier in the month of February 1982.

There remain several glaring inadequacies in the Appellant's case. We note the following letter sent by the vendor to its solicitors on February 2, 1982 - 20 days' prior to the last date designated for closing, that is to say February 22nd:

> Minden, Gross, Grafstein & Greenstein
> Sutie (sic) 600, 111 Richmond Street West
> Toronto, Ontario M5H 2H5
>
> Attention: (Miss) Peggy Bremner
>
> Dear Peggy,
>
> Re: Lot #119, SAMUEL, Lorne
>
> This is to notify you that in a conversation I had this morning with the above-mentioned purchaser, he indicated to me that he will be sending us a letter requesting an extension of his closing date.
>
> The transaction is presently scheduled to close on February 22, 1982. He would like for it to be in March sometime.
>
> Yours truly,
> RALEIGH CHASE DEVELOPMENTS LIMITED
>
> "E. Piekarz"
>
> Per: (Ms.) Eva Piekarz
>
> /ep

We accept the evidence that the above letter was in fact sent and believe the statements contained in it to be substantially true. But it tends to undermine the version of events presented by the Appellant.

Moreover, the Appellant has not proven that the vendor could not close. He has not proven that he has sustained a loss of $2,000 due to a cause or causes beyond his control

In the opinion of the Tribunal the Appellant, an intelligent, capable solicitor, has failed to prove his claim to the Tribunal's satisfaction. The Warranty Program's decision will therefor be upheld.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs HUDAC New Home Warranty Program to disallow the claim.

MR. AND MRS. P.R. SURI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: MR. AND MRS. P.R. SURI, appearing in person

PATRICIA HENNESSY, representing the Respondent

DATE OF HEARING: 18th April, 1984

REASONS FOR DECISION AND ORDER

Notwithstanding the very capable manner in which this appeal has been presented by Mr. Suri, the Tribunal regrets that its interpretation of the law as the same bears upon the facts of this case prohibits it from reaching the decision which would enable it to make the order which the Appellants sought.

This was a claim for a major structural defect arising beyond the expiry of the first year of the warranty.

The subject property is a single detached house forming part of a condominium development. The Appellant did not formerly prove, as we understand was incumbent upon him, that the parts of the house affected by the alleged defects were wholly owned by him and were not in whole or in part sections of the common elements owned by the condominium corporation. But the Tribunal's decision does not turn on that.

The parts of the building having alleged defects and deficiencies included a garage roof, a roof over the front porch, and a basement family room. The roof areas had distortions or were "dished" or rendered somewhat concave by reason of certain factors which we believe included some warping of the underlying 2 x 4 trusses due to drying or shrinkage. A storm door would not open or close properly because it was grinding at the top over a depressed soffit whose condition was an effect of the same cause. Additionally, water was periodically entering the basement due, quite probably, to its entry in wet weather through a hole or holes in the foundation wall which, quite probably, had not been properly closed during construction.

The Tribunal agrees that the roof distortion would be perceived by some people, including potential purchasers, as perhaps aesthetically unattractive. But it cannot believe that all or any of the requirements of the definition of a major structural defect set out in the Regulation to the Act were met. The deformities in the roof may cause the storm door to stick but do not in the Tribunal's opinion render the house, as a whole, uninhabitable nor do they present any danger of collapse such as that danger which is meant by the words "failure of load bearing members" or "load-bearing function". Neither does the dampness in the basement, inconvenient and irritating as it undoubtedly must be, render the house, as a whole, uninhabitable.

Mr. Suri deserves the congratulations of the Tribunal for his courteous, well prepared and well reasoned presentation and the Tribunal is pleased to offer these to him, together with its hope that the same will afford him some consolation for its decision which unfortunately is the only one which it perceives to be open to it.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs Hudac New Home Warranty Program to disallow the claim.

HERBERT AND RUTH WILMS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D. H. MACFARLANE, MEMBER

COUNSEL: CAROL STREET, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 3rd January, 1984

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal determines as follows:

1. The Appellants were served with the Notice of Adjourned Hearing the 19th of December, 1983 as evidenced by Exhibit 4 setting the date of the hearing to January 3rd, 1984.

2. The Claimants have not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

4. There being no evidence placed before it in respect of the claim the Tribunal directs the Program to disallow the claim.

ALEXANDER BODON
(ALSO KNOWN AS ALEX BODON)

APPEAL FROM THE DECISION OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
RONALD RICHARDSON, MEMBER

COUNSEL: ANDREW SZEMENYEI, representing the Appellant

A.N. MAJAINA, representing the Respondent

DATE OF
HEARING: 27th August, 1984 London

REASONS FOR DECISION AND ORDER

The Appellant, Alex Bodon, 45 years old, escaped from Hungary during the events of 1957 and came to Canada where he completed his high school education. In 1967, while still in his twenties, he entered the real estate industry which has been his principal occupation since then. He was married in 1963, separated in 1968 and later remarried. He has a daughter by each marriage. Starting as a salesman with the respected London realtor, Walter Pokusa, he became a Broker with his own business in 1971, but in February 1979 as the result of certain activities which attracted the unfavourable attention of the Registrar of Real Estate and Business Brokers, he voluntarily agreed to give up his Broker's registration and accept registration with the lesser status of Salesman once again.

Subsequent to this, on February 12th, 1982, he was convicted under Section 305 of the Criminal Code of Canada of the crime of extortion and sentenced to 60 days' imprisonment which was followed by a period when he was on parole. He completed his parole on April 12th, 1983. By letter of November 16th, 1982, as a result of a meeting in October of that year and discussion with the Registrar or his associates, who objected to his carrying on business as a salesman while on parole, he voluntarily withdrew his application to be re-registered as a salesperson.

On April 13th, 1983, the day after Mr. Bodon had completed his parole, he again applied to become a registered real estate salesperson submitting an Application for Renewal (Exhibit 3-1c). This was refused by the Registrar by his Notice of Proposal from which Mr. Bodon launched the appeal which has been the subject of this hearing.

The Registrar's Reasons for refusing to register the Appellant are set out on page 3 of the Notice of Proposal as follows:

> (1) It is the Registrar's opinion that the applicant, Bodon, is not entitled to registration as a real estate salesman, for the reason that, having regard to his financial position, the applicant, Bodon, cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act.
>
> (2) Further or, in the alternative, it is the Registrar's opinion that the applicant, Bodon, is not entitled to registration as a real estate salesman, in that the past conduct of the applicant, Bodon, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act.

In support of his Proposal the Registrar supplied particulars as follows (commencing on p.3):

PARTICULARS

> (1) On an inspection of the books and records of Alex Bodon Real Estate Limited, which had commenced on January 25, 1979, Bodon admitted to the person inspecting that he had tampered with trust finds and that he had been removing funds from the trust account since some time early in 1978.

The person inspecting such books and records also found that moneys received by Bodon as deposits were not deposited in the trust account of Alex Bodon Real Estate Limited within two banking days of the receipt of such moneys.

(2) On or about February 12, 1979, Bodon attended at a meeting as arranged by the then Registrar's office. As a result of discussion at the meeting, concerning the removal of the trust funds from the trust account, as aforesaid, Bodon consented to the revocation of the registration of Alex Bodon Real Estate Limited and of Bodon as real estate broker and the Registrar consented to the registration of Bodon as a real estate salesman for a period of two years.

As stated previously, Bodon again became registered as a real estate salesman of the Pokusa corporation and such registration continued on the records of the Registrar up till March 12, 1979, when it was terminated by the Pokusa corporation.

(3) Bodon was charged with the following offences which resulted in convictions and a term or terms of imprisonment:

(a) HER MAJESTY THE QUEEN

VS

DANIEL STEPHEN BANGARTH
GUISEPPE (JOSEPH) SERRATORE
ALEXANDER BODON

DANIEL STEPHEN BANGARTH, GUISEPPE (JOSEPH) SERRATORE AND ALEXANDER BODON STAND CHARGED THAT between May 1st 1980 and February 2nd, 1981 at the City of London, in the County of Middlesex, did without reasonable excuse with intent to extort money, did attempt to induce Robert Dermo by threat; to pay the said money to Guiseppe Serratore, contrary to Section 305(1) of the Criminal Code of Canada.

[The said particulars here recited an additional charge which we have deleted because it was withdrawn].

(b) Further, it is the Registrar's information, and he believes it to be so, that Alex Bodon Real Estate Limited and Bodon were also charged with three counts of evading payment of income tax and two counts of filing false returns.

(c) It is the Registrar's information and he believes it to be so, that on or about August 11, 1981 Alex Bodon Real Estate Limited and Bodon were found guilty of the charge or charges concerning evasion of the payment of income tax, that Bodon was fined and that Alex Bodon Real Estate Limited was also fined. It was further ordered that if payment of the fine was not made, Bodon would be sentenced to a total term of 12 months' imprisonment.

(d) On or about February 12, 1982, and after a plea of guilty, Bodon was convicted of the charge of extortion and he was sentenced to a term of 60 days, such term to be consecutive to any other sentence that Bodon was serving. The charge of conspiracy was not proceeded with.

(4) Particulars of judgments obtained against Bodon and others, as certified by the sheriff, are set out hereunder:

Creditor	Defendant/s	Date	Amount	Interest
Lerner & Associates	Alexander Francis Bodon	20.10.78	$ 305.75	From 20.10.78
Bank of Montreal	Alex Bodon Real Estate Limited, Alex Bodon & Vilma Bodon	6. 5.80	$9,869.28	At 16.75%
Bank of Montreal	Alex Bodon Real Estate Limited, Alex Bodon & Vilma Bodon	6. 5.80	$8,453.91	At 16.75%
Toso Brothers Tile Company Limited	Alex Bodon	24.11.81	$ 390.95	At 22.75%

(5) The then Form 4, being a form prescribed by the regulations under the Act, was prepared, completed and signed by Bodon, respectively, on April 18, 1979, April 19, 1980 and April 1, 1981 and the then Registrar, because of the absence of information concerning the said judgments in each such form, did renew the registration of Bodon as a salesman of the Pokusa corporation for each of the three years. However, it was realized only recently that a question, namely, "Are there any unpaid judgments recorded against you?", contained in the said applications (form 4) for renewal of registration, was responded by Bodon in the negative, contrary to the facts stated immediately hereinbefore. Not only did Bodon fail to declare the particulars of the judgments, specified above, but he also failed to declare a judgment and particulars thereof issued against him by the Family Court, 80 Dundas Street, London, Ontario.

(6) On October 5, 1982 Bodon made an Assignment for General Benefit of Creditors under The Bankruptcy Act, the Trustee for this purpose being Atkinson, Neill Limited. Factors, such as the following are noted:

(a) The total sum owed by Bodon to his creditors amounted to $134,780.00, according to a List of Creditors submitted by the Trustee. The total sums owing, rspectively, to the Preferred, Secured and Unsecured Creditors were shown in the List as amounting to $85,000.00, $3,800.00 and $45,980.00.

It is noted, particularly, that Bodon owed $74,000.00 and $11,000.00 to two Preferred Creditors, namely, Revenue Canada Taxation and Family Court. Also Walter Pokuski (sic, Pokusa) was shown as one of the unsecured creditors, the amount owing to him being $16,000.00.

(b) An Order made by the Supreme Court of Ontario In Bankruptcy on August 5, 1983 is reproduced hereunder, in part, to point out that Bodon's discharge from bankruptcy has been delayed and he still remains an undischarged bankrupt:

> "AND WHEREAS proof has been made of the following facts under Section 143 of the Bankruptcy Act, namely:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;
>
> (b) the bankrupt has committed any offence under this Act or any other statute in connection with his property, his bankruptcy or the proceedings thereunder;
>
> IT IS ORDERED that the Bankrupt's discharge be suspended for one year and that he be discharged on and from the 5th day of August, 1984."

At page six of the Notice of Proposal the Registrar then added the following further allegations:

(1) Considering the removal of trust funds from the trust account, the Registrar believes and alleges as follows:

(1)
Alex Bodon Real Estate Limited, through Bodon, and Bodon did act contrary to the then section 31(1) and (2), currently and identically section 20(1) and (2), of the Act; and

(2) Alex Bodon Real Estate Limited, through Bodon, and Bodon did act contrary to the then section 20(3), currently and identically section 23(3), of the regulations made under the Act.

(2) The Registrar considers the circumstances leading to the charges of extortion and evasion of income tax, followed as they were by convictions and sentences, all as aforesaid, serious in nature. In addition, the Registrar is informed, and he does believe, that the charges concerning evasion of income tax stemmed mainly from the activities of the registered brokers, Alex Bodon Real Estate Limited and Bodon, in respect of the sale and resale of a certain real estate property or certain properties at Dundas and Third Streets, in London, Ontario; or

(3) The Registrar believes and alleges that Bodon did act contrary to section 50(1)(a) of the Act, for the reason that he did furnish false information in the said applications (Form 4) for renewal of his registration, in that he did not declare the fact and full particulars of unpaid judgments and/or convictions recorded against him, all as aforesaid; and

(4) The Registrar believes and alleges that each said application (Form 4) for renewal of registration is a false document and that Bodon did falsify each said application to obtain the renewal of his registration; or

(5) The Registrar believes and alleges that Bodon did breach a term or condition of the registration, prescribed by section 13(1) of the regulations, the intent and purport of which is to ensure that each registrant shall supply full and true answers to the questions in an application for renewal of his registration. Further, each registrant, when filing an application (Form 4) for renewal of registration, is warned by words therein that "ANY FALSE STATEMENT MAY RESULT IN REFUSAL OF THIS APPLICATION".

The Registrar's reasons (set forth above) are founded upon Section 6(1)(a) and (b) of the Real Estate and Business Broker's Act, as follows:

> "6(1)(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
>
> 6(1)(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or"

Section 9(4) of the said Real Estate and Business Brokers Act empowers the Tribunal to substitute its opinion for that of the Registrar and it is to be noted that in order to succeed in this appeal from the Registrar's Refusal to Renew Registration, it would have been incumbent upon the Appellant to convince the Tribunal that the Registrar was wrong in respect to both of his Reasons, the one found in Section 6(1)(a) and also the one based on Section 6(1)(b).

This he has failed to do notwithstanding the very capable presentation set forth on his behalf.

Upon the evidence, the Tribunal finds that the most recent application for renewal for registration (Exhibit 3-1) contains misrepresentations by way of omission or misstatement. These include non-disclosure of judgments outstanding against him at question 6 contrary to the truth as proven at the hearing, as well as failure to provide full particulars of all convictions since the date of last filing (viz. April, 1980) as required by question 7.

The Tribunal's opinion is that these were both deliberate and intentional and as well that they were intended to deceive. This constitutes conduct which offers reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty if registered.

The Tribunal also finds that in prior and previous applications which were submitted in other years, applications either for brokers' or salesman's registration, the Appellant also made false, incomplete and misleading statements thereby affording the same grounds for the same belief as to his probable future conduct.

The Tribunal also finds, notwithstanding his disclosure of the same, that the fact of the Appellant's conviction upon the charge of extortion, and taking into account all the factors and circumstances thereto relating including some which were somewhat mitigating, also afford reasonable grounds for an unfavourable assessment of his probable future conduct in the terms set out in Section 6(1)(b).

The Tribunal also finds, notwithstanding his disclosure of the same, that the fact of the Appellant's conviction upon certain charges relating to offences under the Income Tax Act of Canada also offered reasonable grounds for an unfavourable assessment of his probable future conduct in the terms set out in Section 6(1)(b).

As well, the Tribunal finds that the convictions under the Income Tax Act and the various judgments registered against him, including a judgment or judgments filed with the local family court respecting alimony and/or maintenance of and for his elder child and/or for his former wife, which said last-mentioned matter has been chronically and extensively in arrears on and off for many years so as to demonstrate that the Appellant is a chronic delinquent judgment debtor (notwithstanding that he has on several occasions been in possession of large sums of money), relate to his financial position (past and present) and demonstrate to the satisfaction of the Tribunal that the Appellant cannot reasonably be expected in future to be financially responsible (or to behave in a financially responsible manner) either in the conduct of his business or otherwise.

The Tribunal finds that the allegations set out at paragraph (1) of the Registrar's proposal, allegations having to do with the books and records of Alex Bodon Real Estate Limited, relating to the Appellant's having tampered with trust funds, having removed funds from the trust account, and having failed to deposit monies received as deposits into the said trust account, have all been proven to the Tribunal's satisfaction and that these, too, demonstrate to the Tribunal that the Appellant cannot reasonably be expected to be financially responsible in the conduct of his business.

Thus the Registrar's reasons should be upheld on all grounds and both branches.

Concerning the words "financially responsible in the conduct of his business", considerable discussion took place at the hearing as to the application of such a term to a person registered as a salesperson as opposed to a person or a corporation registered as a broker. It was urged that a salesperson would invariably be an employee working for a registered broker and that the business for which he or she would be working would not be "his business" but the business of his employer, and therefore that the words in question as they appear in Section 6(1)(a) would have no applicability to a salesperson - only to a broker. This question has been raised before and the Tribunal welcomes the opportunity to express its view or opinion relative thereto.

The word "business" as it is frequently used in common and contemporary parlance (as for example where it is used in the name of the statute under which this hearing has been instituted) usually refers to a business enterprise or a business concern. However, we have had regard to The Shorter Oxford English Dictionary, and note that the definitions there provided include "the state of being busily engaged in anything", "activity", "that about which one is busy; function, occupation", "state of occupation, profession, or trade", "occupation; serious occupation, work". In the Tribunal's opinion the words "financially responsible in the conduct of his business" or "its business" when they relate to the activities of a registered broker would refer to the operation of a business in the sense that a business was a business concern or enterprise. They would also relate, however, to either kind of Registrant's general activities according to the exemplifications furnished above. In the case of a registered real estate salesperson, therefore, "his business" would be the activities in which he or she was engaged, inter alia would mean the activities which he was performing or in which she or he was engaged during the course of that salesperson's employment. In short the word has full and complete application to both real estate brokers as well as to real estate salespersons. The Tribunal hopes that the above expression of its view and opinion will set this particular question to rest both in respect to this Act and other similar statutes.

Certain additional comments upon this case are in order.

Firstly, it is a general principle of great importance that a person should not be lightly deprived of his or her means of gaining a livelihood. In this case Mr. Bodon, who is 45 years of age but who could pass for a man considerably older, quite overweight and said to be in poor health, has spent "the best years of his life" in the realty business. He has been offered employment in what appears to be one of the best real estate brokerage firms in London. He is going to have a very hard time to find alternative employment. It is likely that he and his dependents will be and will continue for some time to come to be a charge upon the public purse as we gather he and they are at present and have been since the day he earned his last commission. The Tribunal as did the Registrar in the first instance we are sure, feels a heavy responsibility in making this decision. It was urged in a very capable and compelling argument on Mr. Bodon's behalf that the Charter of Rights and Freedoms of Canada entitles every citizen to the right to make a living, that he has been punished enough for his crimes and misdemeanors, that he is in a "Catch 22" situation - ordered to pay into the Family Court, but not allowed to earn a living.

But it seems to the Tribunal, that its function and that of the Registrar in the first instance, is not to punish. It is to protect. There are different species of misconduct which different individuals appear to possess propensities to commit thus setting other members of the public at risk. It is frequently necessary to put the interests of totally and absolutely innocent potential victims at an even higher level of consideration than those of an applicant for registration, who, in the criminal sense, has already been punished. This is not easy, especially when the individual the Tribunal sees before it is a palpable person while the ones protected from harm are anonymous members of the vast public at large whom one does not see as specific individuals. It is not easy and it should not be easy. We believe that no effort should be spared in any instance to examine and re-examine every possible way in which fair play and decent consideration can be assured to all the interests in any given problem situation with which the Registrar or later the Tribunal may be faced.

However, in a line of decided cases the Tribunal has clearly stated its belief in the supremacy of the public interest as well as the supreme importance it places upon the principle that members of the public must perceive with confidence that regulated industries are conducted by honest men and women in a strictly honest way. We were referred to the following cases reported in Volume 11 of the Decisions of the Commercial Registration Appeal Tribunal for 1982:

Archer, Marshall N. (Marsh Archer Motors Ltd.) p. 34
Gilford Garage Service Limited p. 52
Goheen, Allan Raymond p. 158
(The Registrar was entitled to full disclosure)

also to Jack F. Cannan 12 C.R.A.T. (1983) p.57

In the Gilford case it was said p. 53 that "the Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of the applicant to be registered. He is entitled to a full disclosure of all facts--all the relevant past conduct, upon which to base that judgment."

In the Goheen case it was said (at P. 175) "had the Registrar been provided....with the information he was entitled to receive....loss and trouble would....have been avoided or greatly reduced because the Registrar, had he been informed, would undoubtedly have caused the affairs to have been subject to regular inspection here." (In other words the Registrar was entitled to full disclosure.) In the case of Jack F. Cannan and Registrar of Motor Vehicle Dealers and Salesmen it was stated at page 58 "the Tribunal finds it encumbent upon it to state that it takes a very serious view of past criminal convictions by an Appellant. Further the Tribunal wishes to state that it wholeheartedly supports the Registrar's policy to refuse registration and to serve a Notice of Proposal in all instances where there has been such non-disclosure".

In the case of Berton Kelley decided April 24, 1984, it was stated that "the Registrar is entitled to all of the facts to enable him to make a decision as to the fitness of the applicant for registration".

It is also interesting to note that in some of the rare cases where the Tribunal chose to overlook non-disclosure - possibly on the grounds that it had been minor or where there were extenuating circumstances or where the applicant had what appeared to be special merit and deserved special consideration it was reversed on appeal. An example of this might be Richard M. McClocklin (originally reported at 12 CRAT (1983) P.70) where the applicant had been convicted upon a charge of extortion under the Criminal Code of Canada and made less than candid disclosure upon his application for registration. The applicant had a short temper and was given to impulsive violent behaviour not all of which was necessarily negative for the evidence disclosed that he had on one occasion given valuable assistance to an officer who was being menaced by a gang of toughs and in another had impulsively leapt into the frozen waters of Lake Simcoe to save the life of a small boy who had fallen through the ice and had been awarded a medal for bravery. Notwithstanding this, so serious a view did the Divisional Court take of the crime of extortion and of the applicant's failure to provide full and frank disclosure in the applicaion that the Tribunal was deemed to have erred, its decision set aside and the Registrar's decision was reinstated.

Upon the facts of this case and upon due consideration of the authorities by which it is guided, the Tribunal has no choice but to uphold the Registrar's decision.

The Tribunal notes that there does not appear to be any record of the Appellant actually having cheated a client or any other person during the course of a Real Estate transaction and also that there do not appear to have been any complaints of any misconduct towards members of the public during the course of his work in the industry. The Tribunal reminds both of the parties to this appeal of Section 10 of the Real Estate and Business Brokers Act which reads:

> A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal and to Refuse Registration.

WILLIAM A. BRENNAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WILLIAM J. BINGLEY, MEMBER

COUNSEL: WILLIAM A. BRENNAN, appearing in person

STEPHEN MARTIN, representing the Respondent

DATE OF
HEARING: 23rd May 1984

REASONS FOR DECISION AND ORDER

The Appellant, a man of some 37 years of age, has applied for registration as a real estate salesman. He was registered for some 5 years or so during the 1970's and early 80's and had an unblemished record, but that registration lapsed so that he was obliged to make a formal re-application at which time it was revealed to Mr. Binstock, the former Registrar of Real Estate and Business Brokers, that the Appellant applicant had been convicted in 1978 on a guilty plea of possession of both cocaine and marijuana. It also appeared that subsequent and even more serious charges were pending, including a charge of possession of marijuana with intent to traffic. No attempt had been made by the Appellant applicant to disguise or hide these embarrassing facts and, to the contrary, he has at all times, both at the hearing of this appeal and otherwise, as far as we are aware, displayed both frankness and candor.

Section 6(1)(b) of the Real Estate and Business Brokers Act provides that:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty

The Registrar, as appears from the Proposal, and as reiterated by Mr. Coleclough in his testimony, believes that Mr. Brennan is disentitled to registration upon the grounds cited.

The Appellant has displayed considerable honesty in the way he has responded to questions - that is to say in a wholly open and truthful way. However, he has, during the past, broken the law, albeit laws, which he says have no bearing upon his ability to sell real estate.

The Tribunal's function is certainly not to question the law and thus, it must concur that the law was broken by him and therefore that his past conduct has indeed been exceptionable to that extent within the meaning of the subsection. He has also displayed an attitude which does not convince us that he is totally unlikely to do so again.

But the greatest single problem presented by the evidence and which the Tribunal is unable to accommodate at this time concerns the approximately $34,000 in cash, together with an undisclosed quantity of gold coins and gold wafers which the police seized from the Appellant's home in June of 1982 and still refuse to return to him upon the grounds that this money and gold might constitute the illegally gained avails of very large scale trafficking in cannabis and/or other drugs. This matter, we are told, is at issue and the right of the police to retain this money, etc., or the right of the Appellant to have it back, will be determined at certain replevin proceedings which we understand are imminent but still pending.

If the authorities charged with the enforcement of the drug laws were to succeed in establishing that such a large sum had indeed been found in the Appellant's possession as the fruit of large scale drug trafficking the Tribunal would conclude that he was totally and utterly unsuitable for registraton in this industry or any other industry regulated upon the criteria set out in Section 6(1)(b). So long as the issue of the provenance or source of so much gold and cash is at issue the Tribunal cannot direct that the Appellant be enrolled and given registration at this time.

For the present, the Registrar's Proposal must be upheld.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MICHAEL J. DELANEY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HARRY L. SINGER, MEMBER
WILLIAM J. BINGLEY, MEMBER

COUNSEL: MICHAEL J. DELANEY, appearing in person

STEPHEN AUSTIN, representing the Respondent

DATES OF
HEARING: 10th and 11th May, 1984

REASONS FOR DECISION AND ORDER

Michael J. Delaney (the Appellant) has applied for registration as a salesman under the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431.

The Registrar has issued a Notice of Proposal to Refuse Registration on his opinion that the Appellant is not entitled to registration under Section 6 of the Act as:

> " (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and
>
> (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty"

the particulars of which are set out in the Notice of Proposal.

The Appellant does not deny the truth of the particulars except as to the exactness of certain figures.

The Tribunal finds that on or about the 4th day of February, 1982, the Appellant was convicted of Breach of Trust (19 charges) for which the Appellant was sentenced to 15 months on each charge concurrently and probation for two years. The Appellant was paroled on the 7th day of July, 1982.

At the time of this hearing, the Appellant has completely discharged the consequences of the convictions.

The Appellant was an accredited member of the Law Society of Upper Canada. On or about the 16th day of January, 1981, the Appellant was disbarred for his actions with respect to over $180,000 of clients' trust funds. Such action by the Law Society of Upper Canada was directly related to his criminal charges of Breach of Trust.

A search of Writs of Execution in the Office of the Sheriff of the Judicial District of York discloses a considerable list of Writs of Execution against the Appellant, some in respect of the actions related to the breaches of trust, others in respect of personal obligations of some $50,000. There are also obligations of the Appellant in respect of which no Writs of Execution exist relating to the breaches of trust. Reimbursement has been made to the clients by the Law Society. No restitution or payment of any of the obligations of the Appellant has been made by the Appellant.

The Tribunal finds that there was no evidence before it that the Appellant profited in any direct personal way and finds that the action of the Appellant was taken in a rescue operation of certain investors at the expense of clients whose monies were in trust.

The Appellant has explained his actions of irrational and not normal behaviour on depression and panic resulting from a series of events, which he has described as unfortunate. He accepts the judgment that such actions cannot be condoned.

The Tribunal has the power to substitute its opinion for that of the Registrar. The issue is where it should do so.

The Registrar and Tribunal have an obligation under the Statute. The Statute is one which the Legislature has deemed specifically necessary for the protection of the public. Those who wish to enter the business of real estate must meet certain criteria. Their entitlement to entry into that vocation is limited by certain exceptions, one of which is where "the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

It is a most significant factor that the Appellant has been disbarred from a profession in which the Code of Ethics has as an initial heading "Integrity" and in which Rule #1 reads:

> "The lawyer must discharge his duties to his client, the court, members of the public and his fellow members of the profession, with integrity"
> (emphasis Tribunal's)

The commentary on the rule, (which cannot be controverted), is as follows:

> "Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession."

Now the Appellant is seeking entry into a vocation in which the Legislature has spelled out as one of the criteria, in addition to that, for example, expected of all vocations, "in accordance with the law" also that of acting with "integrity". The standard is just as high for those who seek entry to the real estate vocation as it is to the legal profession. Indeed, those who practise the vocation of real estate do count themselves as professionals and subscribe to the same high standards.

If a fundamental quality of the practise of law is "integrity", the Legislature has also expressed that same quality, which must be considered therefore fundamental of those in the business of real estate.

The Appellant has indicated that in his opinion the risk to the public from a salesman is not very great. However, it is to be noted that the Legislature has not, in setting down its criteria, differentiated between the various types of registration. Again the Tribunal reiterates that the ethic related to the breach of trust of which the Appellant was found guilty is the very basis of entry into the vocation sought.

The financial obligations outstanding by the Appellant are formidable. Nothing has changed with respect to them in two years.

There is no doubt that the attitude of the Appellant in his personal life since the conviction and disbarment has been without further improper action. It has been the belief of the Tribunal that it is what is expected of all citizens living within our society.

The Appellant enjoys high favour with many of those who have had dealings with him in a personal and business way. Such opinions are not be disregarded, and are commendable. But the responsibility lies with the Registrar and the Tribunal.

The Tribunal finds on the material before it no reasons for substituting an opinion different to that held by the Registrar.

Accordingly the Tribunal finds that the Appellant is not entitled to registration under Section 6 of the Act as:

> " (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and
>
> (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

The Tribunal is not unsympathetic to the Appellant and read his reasons for requiring a hearing with sympathy. It balances that sympathy with a view that it must have in the interests of the public. It is this sympathy that leads the Tribunal to draw attention, to make reference, in its decision to section 10 which reads:

> "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Should such further application be made, the Tribunal would suggest to the Registrar that he review in depth and analyse more fully than has been possible at this hearing by him and the Tribunal of those facts and views set out in Exhibit 9, and which may be presented in a more direct way than has been done at this hearing.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

LEO JOSEPH HARE

APPEAL FROM A DECISION OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
JOSEPH STRUNG, MEMBER

COUNSEL: HUGH ROWAN, Q.C., representing the Appellant

A.N. MAJAINA, representing the Respondent

DATE OF HEARING: 5th, 18th and 22nd July, 1983
9th and 21st September, 1983

REASONS FOR DECISION AND ORDER

Clarence Hilton, who might be described as the "complainant" in this unfortunate case, lived with his wife Geraldine in a frame bungalow situated on a parcel of rural property having a frontage on a country roadway of 150' by a depth of 200' in the Eramosa Township in Wellington County. That parcel had been carved out of the family farm, consisting of some 89 or 90 acres, which Mr. Clarence Hilton's mother, Mary Emma Hilton, who was over 90 years of age when this story begins, had inherited from her forbears. The whole farm including the bungalow section where Clarence and Geraldine resided, (and which had been deeded to them by Mary Emma in 1970) had been in the family for 100 years or more and there was a big old brick house, the original farmhouse, at the end of a drive and at some distance removed from the public roadway where the old lady resided with her equally elderly husband, George Hilton. Clarence and Geraldine's son and his wife Wilma Lee also lived in the big brick house.

For all intents and purposes it was Clarence Hilton who ran the farm. This consisted for the most part of raising some pigs and cattle and attempting to keep his creditors, mortgagees and others, at bay and, from all accounts, Clarence, who had grade eight education and no more, was chronically unsuccessful at this.

The struggle to keep up the two mortgages, which encumbered the whole farm including the bungalow parcel as well as the 89 or 90 acres, was of long-standing and continuous and at the time the story begins the second mortgage was so far in arrears that the Second Mortgagee had obtained a Writ of Possession under the Power of Sale contained in that mortgage. The second mortgagee was Guaranty Trust as trustee for the Registered Retirement Savings Plan of Kenneth Charles Robinson and Kenneth Jones, sometimes known as KCR Investments Limited.

As the story opens the whole Hilton family including the old people and the young people who lived in the big brick house were in the throes of being physically evicted by the Sheriff who was armed with the Writ of Possession and being assisted as we understand by a force of police, Sheriff's officers and others. Clarence Hilton was resisting this eviction. His way of doing this, interesting because it gives some insight into his general way of doing things, was to organize a counter force called "the farmers' action group" or "farmers' survival group" who confronted the Sheriff's forces mounted and angrily riding around on tractors, armed with pitchforks and shotguns, after first calling in the T.V. and Radio people who joyfully put Mr. Hilton, who displays more talent for raising a hullabaloo than raising pigs, "on the air".

Leo Joseph Hare, whom we are tempted to refer to as the victim in this unfortunate case (although that was his own fault in substantial measure) was sitting in the kitchen of his home in Guelph with his wife finishing breakfast and listening to the radio when Mr. Hilton went on the air. He was fascinated as the announcer told of the farmers' action group, and as he pictured the farmers with their pitchforks and shotguns trying to save Hilton and his family, including the frail elderly ones from eviction from their century-old ancestral property, he remembered that he knew Hilton and had been able to help him in the past.

This eviction was happening in the late winter of 1982. Mr. Hare who is 38 years of age and who was registered as a real estate salesman in April of 1979, was associated with the firm of Royal City Realty Limited. Before that he had been employed by the Bank of Nova Scotia at their head office in Toronto and before that he was for quite a few years in the financial business in Guelph with Avco Financial Services which we understand is in the business of offering personal loans as well as financial counseling and debt management assistance to a class of clientele of which Mr. Hilton is a member.

Mr. Hare was born at Simcoe, Ontario and has grade 12 education. He is married and lives with his wife and their three children. He does charitable work, including helping with the Cancer Society campaigns and supervising Boy Scouts of whom his two sons are members. He attends Holy Rosary Church. He has never been charged or convicted of any criminal offence. Prior to the present affair he has never been the subject of any complaint whatsoever arising from his conduct in the real estate business.

During the years Hare was employed with Avco Financial Services Mr. Clarence Hilton had been one of Hare's most frequent clients. Mr. Hare informed the Tribunal that during those years Hilton had been a chronic debtor in consistently bad shape, his financial situation over the years having been very bad on a continuing basis. Hare, as a debt counsellor, assisted Hilton constantly right up until the time Hare left Avco in the mid-seventies by arranging debt repayment programs, consolidation arrangements and so on and so forth and we understand at times Hilton would actually turn over whatever funds he had to Hare for distribution among his creditors on his behalf and at Hare's discretion. Hare got to know Mr. and Mrs. Hilton well and he attended them at their farm many times.

Upon the evidence before it the Tribunal is of the opinion that, at the onset of the happening or happenings complained of, Mr. Leo Hare was a respectable, hard-working citizen of wholly honest and amiable disposition and worthy of every fair and favourable consideration from the Registrar of his industry, from the Board of which he was a member, and otherwise.

After listening to the radio news, as described above, Mr. Hare telephoned the Hiltons and offered to visit their farm to see if he could be of any assistance to them in their crisis. They welcomed this offer and when he arrived at the farm shortly thereafter the deeds and mortgages were spread out and quite quickly Hare, who had some passing knowledge of the title arising from the fact that some of the Avco loans to the Hiltons in the past had been secured by mortgage (although Hare had nothing approaching the skills of a trained lawyer, as we shall see) perceived a way whereby the situation could be very considerably improved.

The mortgage which was in arrears, in respect of which Power of Sale proceedings had been carried out and in respect of which a Writ of Possession had been granted to the mortgagee and which the Sheriff was trying to execute (thereby putting the mortgagee into physical as well as legal possession), was the Second Mortgage in favour of Guaranty Trust as trustee or sometimes known as "the KCR mortgage". The spokesman for that interest was Mr. Kenneth Charles Robinson, the beneficial co-owner of the same. There was also a first mortgage, to Duco Community Credit Union Limited, which was not in arrears. Each of those two mortgages covered the whole farm property, viz., the whole 89 or 90 acres upon which stood the frame bungalow (on the 150' by 200' lot conveyed by Mary Emma Hilton to Clarence and Geraldine in 1970) as well as the big brick house which was the residence of the very elderly people and Clarence and Geraldine's son and their daughter-in-law, Wilma Lee. Each mortgage had been signed by Mary Emma and George, her husband, as well as by Clarence and Geraldine (although the latter couple held title only to the 150' by 200' lot - part of the 89 or 90 acre whole - on which stood the frame bungalow).

The eviction proceedings were being prosecuted with a view to putting the second mortgagee into possession of the whole 89 or 90 acre farm - the whole of which was the subject of the Writ of Possession. The persons who stood to lose their homes and who faced the prospect of losing the rooves over their heads were the whole Hilton family, all three generations of them - the occupants of both houses, both the bungalow and the big brick house. The amount of money by which the Second Mortgage was in arrears was some $46,000.00 more or less. What Leo Hare perceived, and he quickly communicated (or attempted to communicate) to the Clarence Hiltons was that when Mary Emma Hilton (the old lady) had deeded the 150' by 200' lot (the bungalow lot) to them in 1970, the Committee of Adjustments for the Township of Eramosa had given severance consent (the same being attached to the deed, which was Registered Instrument M-98866 for the said Township) and that the smaller parcel could consequently be conveyed away separately from the larger one, and if the frame bungalow and the land it stood on could fetch the whole or the bulk of the sum by which the second (KCR) mortgage was in arrears (to be applied first to interest outstanding and then to principal) and provided the consent of the First Mortgagee were forthcoming, then all the remainder of the farm, including the income-producing land, the out-buildings and the big brick house would be saved. Clarence and Geraldine, of course, would have to move in with the others but what a preferable solution to the alternative!

When Leo Hare revealed this plan to the Hiltons, this plan to sell the bungalow to save the farm, they understood and agreed that it was the best that could be done in the circumstances; circumstances be it emphasized, which were dire and desperate and wholly due to Clarence Hilton's propensity for getting into debt. So Leo Hare phoned Mr. Robinson (referred to above as the spokesman for the Second Mortgagee) to see if he would agree to the plan. Mr. Robinson, an investor and businessman, who was possibly affected or even somewhat intimidated by Clarence Hilton's propaganda initiatives, perceived that the plan proposed was the best of various alternatives available to him as well. He even felt that an amount somewhat less than the full amount owing would be acceptable provided the arrears of interest were paid in full and brought up-to-date, and as well that whatever principal balance remained outstanding would be secured against the balance of the farm property. But he adamantly insisted that the sale be completed as quickly as possible. We believe that he anticipated a "stall" on the part of Hilton; that he suspected that Hilton was not really serious, that he was not bona fide or at least whole-hearted in his agreement to the plan, or at least, that he didn't trust Mr. Hilton and was unwilling to waste any more time than was essential. So Robinson made it clear to Hare when the latter proposed the plan to him that from his standpoint (Robinson as spokesman for the Second Mortgagee) while the plan, which was to sell the bungalow to save the farm, was acceptable in principle, time was still of the essence. And we suspect, upon the evidence, and upon the tenor of the evidence, that Clarence Hilton at this time had some special thoughts of his own in respect to the plan to sell the bungalow to save the farm.

We suspect he didn't really want to give up the bungalow. He really didn't want to move into the already crowded and no doubt run-down big brick house. Neither did his wife. His original idea was to organize a "farmers' action group" and to prevent the execution of the Writ of Possession through intimidating the mortgagees by skilful manipulation of the media. Also, as a chronic debtor of long standing, he was, as we are quite able to infer from the evidence and our assessment of his character, a great believer in the healing powers of time. Leo Hare's idea (the plan to sell the bungalow to save the farm) had merit; perhaps too much merit in Hilton's view as we assess it. What the situation really called for was a good long "stall". So Clarence's idea as we see it was to list the bungalow for sale thereby drawing off the immediate heat, certainly getting the Sheriff off his back for the indefinite future, but at the same time not to create a situation which would pose any real danger to his and Geraldine's continuing enjoyment of their abode. Thus, the thing to do, as Clarence figured (i.e. as we do), was to set the asking price at an amount safely above what anyone would actually be willing to offer. And again, if the bungalow did go for more than it was worth, especially if that amount were in excess of the approximately $46,000.00 owing, the excess would flow into Clarence's pocket and thereby sweeten the bitter pill of having to move.

The Tribunal has studied the evidence, which it deems to be real and cogent evidence, and is satisfied that the foregoing assessment thereof fully justifies our view of what did, in the balance of probability, transpire in this case as we have examined the story thus far. What happened next in the unfortunate sequence of events comprises the crux of the Registrar's complaint.

The Tribunal is fully satisfied that up to this point nothing in Mr. Hare's conduct or the motivation underlying his conduct was other than completely proper and, indeed, generous and good-hearted. One of the witnesses called on his behalf was Richard Morrow, Esq., a member in good standing of the Law Society of Upper Canada, a barrister and solicitor in active practice in the Guelph area who acted for the purchasers in the sale of the bungalow which eventually took place. In the course of his evidence, Mr. Morrow stated "I have had a different type of training from Mr. Hare....we lawyers are more cautious....I think this [what transpired] is a matter of form."

What happened next was that Mr. Hare produced a Guelph District Real Estate Board standard form of listing agreement which he filled in and which Clarence and Geraldine Hilton then signed in his presence as witness whereby the Hiltons gave Mr. Hare's firm the authority, from the 24th of February, 1982 until 24th May, 1982 to list, show and offer for sale the subject property (hereinbefore referred to as the bungalow property) at a price of $50,900.00. Be it noted that such a sale price would, if secured, have netted Clarence and Geraldine a sum of approximately $5,000.00 over and above the indebtedness against the farm. As things turned out and upon the evidence before us the Tribunal is ready to believe and does believe that that asking price was much in excess of the true market value for practical purposes of the property. Why did Hare accept a listing at such a figure? Perhaps more pertinently one may ask why did Hare accept a listing from the Hiltons at all? When a deed of conveyance of the subject property was in due time finally given, accepted and registered, and upon due scrutiny of qualified lawyers, particularly that of Mr. Morrow acting for Mr. and Mrs. Wood who were the eventual purchasers, it was a deed of conveyance granted not by the Hiltons at all, who were not even required to execute a Quit Claim, but by the second mortgagee. Without wishing to adjudicate the question of title, i.e., in whom did title reside at the time this listing was entered into, upon the basis of the facts immediately hereinbefore recited the Tribunal notes that the Hiltons ability to convey the subject property at the material point in time was substantially effected by their relationship with the second mortgagee who was a second mortgagee who had already been granted a Writ of Possession by the Court after initiating Power of Sale proceedings pursuant to the terms of that second mortgage which was grossly in arrears.

The listing agreement referred to above was executed by Clarence and Geraldine Hilton on February 24th, 1983 as aforesaid. On March 11th, 1982 a "change of terms" form was signed which purportedly changed the listing agreement by adding certain words to the effect that any conveyance made pursuant to the listing would be "made by the vendor pursuant to its Power of Sale contained in a mortgage". On April 19th, 1982 a second "change of terms" form purporting to lower the asking price from $50,900.00 to $39,900.00 was signed. In each case the signing was done by Leo Hare. Under "vendor's signature" he wrote "Clarence Hilton" and "Geraldine Hilton" and under "witness" he wrote his own name. He did this on each of the two change forms on March 11th and again on April 19th. These change of terms forms are required by the Guelph and District Real Estate Board to record any changes in any listing agreement. When the subject property is on Multiple Listing such changes are circulated on a regular and frequent basis throughout the local industry. They are meant to be executed with precisely the same formality as the instruments whose terms they purport to vary. The common law of agency applies, however, and provided the agent has the authority to make any contemplated change it appears that his signature clearly marked "by procuration", "per proc", or "per" (e.g. "per Royal City Realty as agent") would suffice - particularly if subsequent confirmation by the principal (approbation) were readily forthcoming.

The first of the changes made in this case amounts to nothing more than an amendment of the listing agreement whereby a potential purchaser is put on notice of the power of sale held by the mortgagee. That change was an innocuous change. It put potential purchasers on notice of a fact situation which their solicitors would have ascertained in short order if they had signed an Agreement of Purchase and Sale without knowing it. The evidence persuades us that Hare did bring this change to the Hiltons' attention (or to that of Mr. Hilton) before making it and that Hilton authorized it.

The second change, purportedly made by the change of terms form dated April 19th, 1982 was more significant of course. However the evidence again suggests that Hare did not make it without the Hiltons' authority, or at least without the authority of both of them as communicated to him by Clarence. The evidence was that "Clarence hit the roof" when told Mr. Robinson insisted that the asking price be lowered to $39,900.00, and that Clarence said "alright - but don't take anything less than $39,900.00". The Tribunal has the choice to accept or reject this evidence, which was given both by Leo Hare and by Clarence Hilton himself during his testimony. The Tribunal is competent to hold as a finding of fact that Hare did have authority from the Hiltons to lower the asking price as well as to make the other change on their behalf and it so holds.

However, it seems that when Mr. Hare applied the names of Clarence and Geraldine Hilton to the forms he wrote those two names in such a way as to make them appear to be their signatures. He failed to write "per", etc. Sometime later, after the deal had closed as aforesaid by deed from Guaranty Trust and completely without any executory compliance by the Hiltons - and in the absence of any protest by the Hiltons - Clarence found out about the change of terms forms and about the two sets of signatures which were apparent imitations of his and Geraldine's handwriting. It should be noted that he made this discovery at a point in time when he was also desperately trying to postpone moving out of the bungalow by requesting postponements of the closing date, making trouble about moving his furniture, even intimidating the Woods with threats of violence. He at once cried foul. He called the police.

The police investigated the complaint, which was one of forgery and possibly, as well, of an unlawful and fraudulent conveyance. The police investigation led the police to the offices of Royal City Realty Limited. There, Leo Hare quickly admitted what he had done. He protested, however, that what he had done was not a wrongful act, nor had it been intended as anything other than a good deed in the interests of and to the benefit of the complainants who had also authorized it. The police, acting on a search warrant which evidently had been issued in respect of pending charges of forgery or uttering forged documents, then seized certain papers and proceeded to the completion of their investigation.

This consisted of a decision by them, upon consultation with a local assistant crown attorney, to lay no criminal charges but to refer the complaint of Clarence and Geraldine Hilton to the Guelph Real Estate Board to the attention of whose Ethics Committee it then came without delay.

When the Guelph Real Estate Board Ethics Committee, whose present Chairman, Mrs. Silvia Bhend testified before us, saw (or superficially saw) what Mr. Hare had done they were deeply scandalized, extremely shocked, and very seriously concerned. Mrs. Bhend said that what Mr. Hare had done to these two forms was what no member or associate member of the Board should ever do, and, with celerity, the complaints against Mr. Hare were dispatched to the Registrar of Real Estate and Business Brokers in Toronto for appropriate action. When the Registrar (or acting Registrar) of Real Estate and Business Brokers saw what Mr. Hare had done, he caused, without delay, a Notice of Proposal to Revoke Registration to issue against Mr. Hare whereby Hare would be forever and for all times barred and expelled from the practice of his profession. He did not offer Mr. Hare an interview at which Hare might have stated his explanation. In the view of Mr. John Richard Cook, Assistant Registrar acting as Registrar at the critical time, according to his testimony before us, Mr. Leo Hare's offence spoke for itself. And therefore the Acting Registrar would hear of no excuse - the offence was wholly indefensible.

"On the facts," Mr. Cook said in his testimony before the Tribunal, "we felt that no useful purpose would be served" by having a meeting or interview with the Registrant in this case, before issuing a Proposal to Revoke - although such a meeting, he further said, is the "usual practice". When asked, on cross-examination on behalf of the Respondent whether he didn't agree that simple decency and fairness required him to speak to the Registrant, to hear his side of the story before issuing the Proposal (which was virtual professional death sentence) Mr. Cook said no, not in this case, because forgery was indefensible.

What is clear to the Tribunal is that Mr. Cook was leaping to the conclusion that there had been a forgery - that the crime of forgery had been committed. Upon what advice he was acting we don't know. He testified "I'm sure we consulted a lawyer"(sic). Forgery, as we are sure a lawyer would have told him, is not a matter of form alone. As a crime, it must be a matter of intent as well. To copy another's signature in an innocent way is not criminal per se. It may be a kind of improper thing to do depending on variable surrounding circumstances, e.g. it may be discourteous, or stupid or imprudent or negligent. It may be a clear breach of regulations governing formality - and yet be lacking in the essential element of criminality, viz. criminal intent, and therefore not a forgery properly so-called.

Section 4 of the Bills of Exchange Act, (R.S.C. 1970) reads:

> Where by this Act any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

and section 3 thereof reads:

> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

In the Tribunal's view, on its assessment of the evidence, Mr. Hare was acting honestly and in good faith. We feel he was negligent in respect to his own interests when he copied the Hiltons' signatures and negligent, very foolish, and otherwise at fault in respect to his obligation to observe the proper formalities of execution of documents pursuant to the delegated authority of an agent. But we believe Mr. Hare did have that authority in each of the two cases. What he did, we are convinced, he did with a benevolent and wholly honourable intent despite the idiosyncratic way in which he went about it. His methodology perhaps reveals a contempt for the Hiltons, a contempt perhaps acquired from long dealing with Mr. Hilton as a kind of financial nursemaid to him. But we do not believe there was any element mala fides in his conduct and to the contrary we think he was wholly anxious to do good for the Hiltons.

At this point in these Reasons we will quote the following letter of Mr. Hare's dated July 22nd, 1982 addressed to R.L. Wilson of the Ministry of Consumer and Commercial Relations at London. This letter either was or ought to have been communicated to the Registrar of Real Estate and Business Brokers.

July 22, 1982.

Ministry of Consumer & Commercial Relations
Middlesex County Court House
80 Dundas St.
P.O. Box 5600
London, Ontario
N6A 2P3

ATTENTION: R.L. Wilson

RE: Clarence Hilton
R.R. #4 Rockwood, Ontario

Dear Sir:

The above mentioned client is attempting to cause untold grief to myself and my family which I feel is totally unjustified. The following data is offered for your consideration.

1. I was transferred to Guelph in 1972 as Branch Manager of Avco Financial Services at which time I met Mr. Hilton and family as a client of Avco (in desperate financial difficulty). Much time and effort on my part resulted in prorating several accounts for the Hiltons. Mr. Hilton was accustomed to calling me at any time of early morning or late evening at my residence because he felt he was being harassed by a creditor. Normally this was due to the fact that he had either paid with an N.S.F. cheque or had not kept his promise to pay and he left the responsiblity of reckoning with his creditors to me. I was able to save the farm on several occasions and keep his head just above water. This information can be verified through Peter Gifford, [barrister, etc.] c/o Kearns, McKinnon & Gifford, 20 Douglas St. Guelph, Ontario.

2. Upon entering the Real Estate field and having no contact with Mr. Hilton for several years, I heard on the news that his property was under foreclosure and that he and several others were attempting to hold off the police etc. from taking the property. After speaking to him on the telephone I went to the farm and offered to help if possible. While there I determined that his bungalow was severed from the farm and suggested he sell same, pay off the Second

Mortgage or most of it) which he had not paid for one year) and save the farm. We phoned the Second Mortgagee from his home and it was made quite clear that the mortgagee had a writ of possession and was in control. I asked who should sign the listing and were told they could care less - just sell it or they would take it.

3. Bungalow was listed at $50,900. (Mr. Hilton's value.) Because the house was so run down and filthy dirty, no offers were received. Second Mortgagee phoned me and said reduce to $39,900 or the farm would be foreclosed on which would result in Mr. Hilton's mother, Emma, who is 93 yrs. old being evicted which would result in a grave situation. (Please see instructions on the file from Second Mortgagee). I telephoned Mr. Hilton immediately and he instructed me to make the change and get an offer for no less than $39,000. I explained that I would do my best to save the farm. (O.P.P. have confirmed this information.)

4. An offer was obtained and several trips on my part resulted in an offer being accepted and signed by the mortgagee so the farm was saved from foreclosure which was the original goal.

5. The O.P.P. contacted our office and concluded that I acted in the Vendor's best interest with no intent to do anything but save the farm.

6. Last week I was contacted by Mr. Gordon Dawe (Broker in Acton) who said he had spoken to Mr. Hilton's daughter-in-law who volunteered information suggesting the Hiltons who had lost cattle, etc. were very vendictive (sic) towards the world and intended to take it out on me. She said that she was present when Mr. Hilton instructed me to reduce the house price and she couldn't understand why he was trying to change his story in order to imply that I had done something unethical. Mr. Dawe said both he and she would testify to this fact. He was unaware of the situation prior to this conversation but felt that he would advise me in the event that I was accused of something that I was not guilty of.

I would like to re-iterate to your department that the action taken on this matter was done so as a result of instructions received both from Mr. Hilton and the Second Mortgagee in order to save a family from losing their farm. In hindsight, it is obvious Mr. Hilton wanted his house listed but not sold so he could live there indefinitely without making payments.

Thank you for your co-operation in this matter and I look forward to hearing from you in the near future.

Yours truly,

L.J. Hare
Representing
ROYAL CITY REALTY LTD.

On November 23rd, 1982, by way of reply to Mr. Hare's letter, the following Notice of Proposal was issued over the signature of Allen Binstock, Registrar of Real Estate and Business Brokers:

REGISTRAR'S NOTICE OF PROPOSAL WITH REASONS

TAKE NOTICE THAT:

1. One Leo Joseph Hare (Hare) has been registered as a real estate salesman with effect from April 30, 1979 and he is presently registered as a real estate salesman of the registered broker, Royal City Realty Limited, pursuant to the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, and the regulations made thereunder (the Act).

2. The Registrar hereby proposes as follows:

REGISTRAR'S PROPOSAL

PURSUANT TO SECTIONS 6 AND 8(2), BUT SUBJECT TO SECTION 9, OF THE ACT, THE REGISTRAR HEREBY PROPOSES TO REVOKE THE REGISTRATION OF LEO JOSEPH HARE, AS A REAL ESTATE SALESMAN, FOR A REASON THAT WOULD DISENTITLE THE REGISTRANT, HARE, TO REGISTRATION UNDER THE SAID SECTION 6 IF HE WERE AN APPLICANT.

3. The Registrar hereby gives the following reason for his said Proposal, as required by section 9(1) of the Act:

REGISTRAR'S REASONS

> The Registrar states that Hare's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act.

AND TAKE NOTICE THAT:

4. The Registrar alleges the following as reasonable grounds for belief in support of his said Proposal with reasons:

(1) On February 24, 1982, one Clarence Hilton and Geraldine Hilton (Hiltons), as owners, signed a "Photo Multiple Listing Service - Guelph and District Real Estate Board Agreement and Exclusive Authority to Sell" (Listing Agreement), the listing broker being Royal City Realty Limited and its listing salesman being Hare. By this Listing Agreement, Hiltons agreed to sell their property, being R.R.#4, Rockwood, Ontario, legally described as Part E, Part of Lot 12, Concession 7, Township of Eramosa, County of Wellington, at the listed price of $50,900.00 and they further agreed to pay a commission of 6% of the sale price to the said listing broker.

(2) On May 31, 1982, the Ontario Provincial Police (O.P.P.) received a complaint from Clarence Hilton concerning the sale of the said property. He alleged that his signature and the signature of his wife were "forged" on two documents by some person at Royal City Realty Limited.

(3) An investigation by the O.P.P. of the complaint made by Clarence Hilton revealed, primarily, that the signatures of Clarence and Geraldine Hilton on two forms, each entitled "Change of Terms Form (Multiple Listing Service) and/or (Exclusive Listings)" (Change

> of Terms Form) and dated respectively March 11, 1982 and April 19, 1982, appeared to be forgeries when compared with the signatures of the Hiltons on the said Listing Agreement of February 24, 1982. The Change of Terms Form dated March 11, 1982 amended the said Listing Agreement by adding a Power of Sale clause, whereas the second such Form dated April 19, 1982 amended the said Listing Agreement by reducing the original listed price of $50,900.00 to $39,900.00.
>
> (4) When questioned, Hare admitted that in each instance he, Hare, signed the names of Clarence and Geraldine Hilton on the said two Change of Terms Forms. It would appear that Hare placed the signatures of the Hiltons thereon without any or any proper authorization from the Hiltons or from either of them.
>
> (5) When questioned, one Wildeboer who was, and still is, an officer and a registered broker of Royal City Realty Limited advised the O.P.P. that Hare had signed each of the said Change of Terms Forms. He added, however, that it was quite a common practice to do this.
>
> The Registrar denies any awareness of the existence of a practice such as this as a "common practice" and states categorically that if it was, or is so, it must stop forthwith.

At the very outset of our commentary on this Proposal, we cannot refrain from expressing our reaction to the last three sentences quoted above. They display an almost wilfully unsympathetic misappreciation of the facts, or at least as they were conveyed to us.

What Mr. Wildeboer told us was that it is a not uncommon practice, when otherwise unavoidable, for an agent to append the signature of a principal to an instrument in the exercise of his authority provided that he has it and provided also that such signing was done by the agent in a manner indicative of the fact that it was an agent signing for the principal (e.g. through the word "per" or something similar). Subsequently, as soon as reasonably possible, the principal should approve in writing such a change. Mr. Wildeboer was not displaying a contempt for convention or the law; when he testified before the Tribunal - and he was an impressive witness, conveying a strong impression of integrity, responsibility and sobriety, he simply stated, addressing the kind of changes in point, a reasonably precise recapitulation of the common law of agency as it applies both in the market place and in court. He never told us, and we disbelieve he ever told any representative of the Registrar, that writing the name or names of principals in a manner seemingly imitative of their signatures was common practice.

It seems to us that what Mr. Hare did wrong was not that he wrote Clarence and Geraldine's names in these forms, for we believe he had authority to do that, but that he failed, when he so signed, to use the word "per" or something similar to show it was an agent who had signed on behalf of a principal. And we feel it was also wrong of him to write the names in what appeared to a good number of people to be in a manner imitative of their handwriting.

This last fault is an excellent illustration of the fact that people who dissimulate or behave in a suspicious manner immediately attract disapproval and are assumed to be embarked upon some dishonesty. But there can be some other explanation. For example, the perpetrator might simply be an innocent fool.

When someone writes another's signature in a manner ostensibly imitative of that person's signature, the inference or suspicion arises that a forgery is being committed, especially if the signature is being applied to a legal document which is subsequently "uttered" so as to alter or, most especially, to detrimentally alter the interests of that person or any other person. But there must be an element of wrongful or evil intention. Something done with a beneficial intention which produces a harmful effect may be less culpable than something done with an evil intention and producing a beneficial effect. In this case, we think it has been shown that what was done was done with a beneficial intention and produced a beneficial effect: therefore it was not a forgery. We think it was monumentally imprudent for Hare to have twice written the four words in what looked like the Hiltons' handwriting. But the essential element of guilty intention is imperceptible to us. We can't find it. We think Hare did what he did in order to help the Hiltons and we think he did help them. And we hold (see above) that the evidence including the testimony of Clarence Hilton himself, shows that he did have their authority to lower the asking price to $39,900. But why he chose to imitate their handwriting when he didn't need to we don't suppose anyone will ever know. Of course, it was an inherently wrong thing to do. It attracted the alarm and consternation of both the Real Estate Board Discipline Ethics Committee and the Registrar, who concluded from an imperfect analysis or appreciation of the facts, that it was a forgery and as such it was mischievous. However, section 6(1)(b) of the Real Estate & Business Brokers Act of Ontario reads as follows:

> 6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

There are two elements set out, the existence of which, in the applicant's past conduct, the Registrar must demonstrate in order to succeed, to wit, lack of integrity and lack of honesty. The past conduct complained of (at paragraphs 1 to 4 of the Notice of Proposal) was the alleged signing of the two names (1) without authority and (2) in circumstances amounting to forgery. The Tribunal has found on the evidence that Hare did have the necessary authority to sign as agent and therefore hereby dismisses the first complaint, that the signing was done without authority. As to the second complaint, i.e. the alleged "forgery", the Tribunal holds that the essential element of evil or guilty intent, or desire or intention to defraud, was absent. Also we find the act complained of to have been done with bona fide and honest intention and that the elements of lack of integrity and lack of honesty are also therefore missing so the Registrar has wholly failed to establish that the Appellant's past conduct, on the basis of the complaints contained in the Notice of Proposal, has been such as to afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty in the future.

As to whether we feel he will be more prudent in the future we make no comment and are glad not to be required to do so. We hope he will be. In consideration of the terrible ordeal through which he has now passed, we find reasonable grounds for great optimism.

The Tribunal shares the Registrar's strict attitude towards the alteration of listing agreements and had the serious wrongdoing which he thought he perceived in this case been proven, which it was not, his proposal would surely have been upheld. The Tribunal has no intention through this decision or otherwise of giving any false impression to the industry that sloppy practices will be tolerated, and the Tribunal hereby declares its intention that the Act and its Regulations shall be strictly enforced by it in the future as in the past and let the industry at large accordingly be so warned.

In the present case, however, the Respondent Registrar having failed to prove the essential elements necessary for his Proposal to succeed, and taking into account the very exceptional facts discovered at this lengthy and expensive hearing, as well as the real and substantial suffering the Appellant has already undergone, the Tribunal considers it entirely proper that this appeal shall be allowed.

The motives of Mr. Hilton in bringing his complaints which provoked this very unfortunate case, cannot be surmised. Mr. Dawe, who was referred to in Mr. Hare's letter, gave evidence which was very much in the nature of hearsay. The Tribunal places no specific reliance upon that evidence for that reason, although the tendency of it is consistent with our assessment of the whole factual situation. Mr. Dawe was a man of straightforward and most open appearance whom it would be almost impossible to disbelieve. As the result of certain extraordinary chance happening he told us that he had met Wilma Lee Hilton and had been told by her that Mr. and Mrs. Hilton were determined to destroy Hare from, essentially, motives of spite. The Tribunal has no need to place its reliance on the evidence given by Mr. Dawe specifically. The truth as we perceived it from our own examination of the evidence is, however, reasonably in line with his story.

We do not consider Mr. Hilton to have been a particularly credible witness. Mr. Robinson, who was substantially disinterested in the outcome of the case, gave evidence which flatly contradicted assertions made under oath by Mr. Hilton. Mr. Hilton said he had not received telephone calls from Mr. Robinson. Mr. Robinson said he had phoned Mr. Hilton on numerous and many occasions and moreover documentary evidence in the form of certain long-distance telephone bills which proved that phone calls had been made from Mr. Robinson's cottage were submitted, and these corroborated Mr. Robinson's testimony which was in direct contradiction of Mr. Hilton's statements under oath. So much for Mr. Hilton's credibility. However, Mr. Hilton admitted that he had authorized the reduction in the asking price which was the subject of the second change of terms form and we would believe that even if he had not admitted having done so. We hold that he did. The Tribunal accepts everything stated under oath by Leo Hare in preference to the testimony of Mr. Hilton wherever there may be any real or perceived conflict in that testimony. This is because we consider the former to be an honest witness while Hilton on more than one point parted company from the truth.

The Tribunal is loathe to express itself bluntly. But there was a direct contradiction between what Mr. Robinson said about the telephone calls in question and what Mr. Hilton testified concerning them. Mr. Robinson said he had called Hilton "many" times - at least weekly. He was actually pestering him to co-operate. Most of the calls originated from Mr. Robinson's office, in respect of which no specific receipts or vouchers were issued by the telephone company. Only a portion of the calls to Hilton were placed by Robinson from his cottage thereby becoming the subjects of specific receipts for long-distance charges. But Hilton denied having received these telephone calls from Robinson. Presumably he did not know that in this particular instance documentary evidence, the long distance vouchers, was available to contradict him, to corroborate that his testimony was false.

It seems to the Tribunal that this puts the Respondent Registrar in an unfortunate position, a position where his principal witness is demonstrably guilty of at least one false statement under oath. What kind of a person, one wonders, would actually utter what can only have been a deliberate and critical untruth at a hearing the purpose of which was to determine whether or not a man's livelihood as well as his public reputation should be taken from him?

People who have never had a gown or a professional degree or been granted a certificate to practise in a profession or a regulated industry frequently fail to understand how much toil has gone into the attainment of these stigmata by the persons who possess them. Frequently all they think of, persons who are lacking in such badges of accomplishment, is that those who have them are vested with advantages in life relative to themselves and they feel envy and resentment as though the process leading to that perceived result were somehow an unfair one. This attitude can sometimes enable them to make complaints and terrible accusations frequently putting the accomplishment of a professional person's whole life's work into serious jeopardy, and this can be particularly infernal where the facts and circumstances are rather complex or where the persons having authority to apply the initial disciplinary sanction - such as the one appealed from to this Tribunal - are hasty, careless or injudicious.

It is the function of the Tribunal to review decisions of the Registrar of Real Estate and Business Brokers of Ontario and to do so as exhaustively and to take as long as the circumstances may require. But the Registrar has also a function and a duty to perform in these cases, and that is to apply due diligence including imagination, common sense, normal compassion and a certain degree of seasoned judgment before turning an issue over to this Tribunal for a further and more complete review than he or his assistants may care to give it. This is not only because proceedings here are very costly to the taxpayers (to say nothing of the Appellants) but because of the very fact that a proposal to withdraw registration, regardless of the outcome of any appeal therefrom, is terribly damaging to the person affected, who is carrying on business or attempting to carry on business in a competitive industry where honesty and integrity and the public reputation for honesty and integrity are the very essence of his or her ability to succeed. One of the questions posed by the Registrar's own application form is "Have you ever been charged or convicted of a criminal offence?" which illustrates that the mere charging of a person, regardless of the outcome of a subsequent trial or enquiry, is a blot against him just in itself.

More people in the area and community where Mr. Hare practises will have heard about the Registrar's Proposal against him than will ever read what we say here. We regret that the Registrar, or whoever had been vested with his delegated authority, had not been more energetic in reviewing this complaint. Perhaps, one wonders, if the Tribunal had jurisdiction to award costs, might the Registrar or his department have been tempted to make a more thorough enquiry, including the granting to Mr. Hare of an interview (with or without his counsel in attendance) at which time he could have stated his side of the story. The Tribunal feels it is bound to state for the record that that refusal, by the Registrar or his department, to grant Mr. Hare an interview when the same was requested was exceedingly unfortunate and unfair, certainly in the circumstances of this case and even so far as they were known or ought to have been known at the time that step was taken.

We hope that the Tribunal's decision and the reasons for it which we have stated above will be of some consolation to Mr. Leo Hare for the financial loss he has sustained in connection with this unfortunate matter and that they may have some effect towards the rehabilitation of his professional honour which, in the light of all we have had the advantage of hearing and seeing concerning it, emerges from these proceedings unimpaired if not actually somewhat enhanced.

For the above reasons and by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal. *

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* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal was subsequently quashed with costs.

LAWRENCE A. JAMES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
SADIE MORANIS, MEMBER

COUNSEL: ARNOLD EPSTEIN, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 19th June, 1984

REASONS FOR DECISION AND ORDER

The Appellant, Lawrence A. James, appealed from the Proposal of the Registrar of Real Estate and Business Brokers to refuse to grant him registration. While the Tribunal had little difficulty in determining that the Proposal should be upheld and delivered, its decision to that effect at the conclusion of the hearing, the facts of the case are rather intriguing and so the Tribunal undertook to deliver, at a later date as soon as practicable, these reasons which may be of interest not only to the parties but to others as well.

Mr. Lawrence A. James, in the words of Mr. Cook, the Assistant Registrar and sometime Acting Registrar, has been registered as a Real Estate Salesman "on and off" since his first application for registration, was granted in 1973. That is to say, he has been in and out of this industry, having enjoyed the status of registration, now and then and from time to time over the past decade or so.

The Regulations to the Act which govern such registration provide where the Registrant fails to complete the annual renewal application within six months of the date upon which it is due such registration shall automatically lapse, but that such lapsed registration may be renewed within the first three years without the Applicant being required to rewrite the examination where an application de novo is made and approved by the Registrar. It was on this basis that the Appellant, has been dropping in and out of this industry over the past decade or more.

The two most recent applications are most germaine. The earlier of these was made on July 8, 1981 and was granted. After the registration thus bestowed had lapsed 18 months later the most recent application, the application which is the subject of the Registrar's Proposal before us, was made on April 13, 1983.

What is interesting is that the 1981 application which was granted contained a surprisingly large number of false statements - answers to questions which were untrue and in the Tribunal's view either wholly or in substantial number deliberately intended to deceive. These inaccurate responses to questions contained in the form of application were not detected in 1981. But in April 1983 the Registrar's ability to detect misinformation, disinformation, non-information, quasi-information or semi-information - as set forth by this Applicant or any other Applicant - had so dramatically improved, that the exceptionable features of the 1983 application were quickly caught by the Registrar's improved screening system.

This is because of the continuing progess which is being made in the storage and retrieval of information, both favourable and adverse, through electronic technology as well as the improved level of co-operation between different sectors of government, as well as surveillance agencies, which this permits.

The unsavoury facts concerning this applicant (the Appellant herein) which came fortuitously and belatedly to the Registrar's attention relate to a number of criminal convictions collected by him over a period of past years, roughly the same as those during which he has been dropping in and out of this industry. They include four separate convictions under the Criminal Code of Canada in respect of each of which his driving licence was suspended and which therefore would have come to the Registrar's attention if either or both of the questions in the application form which are now numbered three and seven had been answered honestly and/or correctly:

They also include a conviction for Possession with Intent to Traffic in marijuana for which the Appellant was sentenced, some time prior to July 8th, 1981 to 15 months imprisonment. The details of that matter included evidence, which we understand was accepted at trial, that 150 pounds of compressed marijuana imported from Jamaica in three suitcases was involved as well as that the Appellant was the "financier", i.e., the man who provides the capital to finance that crime. The registration granted in 1981 was subsequent to the convictions but prior to another interesting conviction in October 1981 for Attempting to Obstruct Justice by giving a false name to a police officer. The Tribunal gathers that the last offence had to do with the use by the Appellant of some other persons driver's licence while his own licence was under suspension (as it remains at the present time, by the way) - an offence which we understand is sufficiently common as to necessitate an expensive revision of the driver's licensing arrangements in this Province whereby in future years our photographs will appear upon our licences. The only one of the above criminal convictions, as well as numerous other Highway Traffic Act convictions which the Appellant referred to in the answers given by him in either the 1981 or 1983 applications was the conviction relating to drugs, which he inaccurately referred to (in the 1983 application) as (sic) "Under the Food and Drug Act, I was convicted for the possession of marijuana". This was the wrong federal statute, he was actually convicted under the Section 4(2) of the Narcotics Control Act of Possession of a Narcotic for the Purposes of Trafficking.

He also failed to make any disclosure whatsoever, in 1981 or 1983, of numerous and serious unpaid judgments against him as required by question six contained in the application form.

These said judgments included, inter alia, one in favour of H.M. the Queen relating to a $500.00 surety bond forfeited.

There is little doubt that the Appellant is currently quite unfit for registration as a real estate salesman and that the Registrar's Proposal is quite proper in respect of the Applicant's past conduct as it relates both to financial responsibility as well as to integrity and honesty. It may be observed additionally that the suspension of his driver's licence currently in effect would also have a seriously debilitating effect upon his ability to function as a real estate salesman.

But what interests the Tribunal the most is (firstly) how such an applicant as the present Appellant was able to succeed in the past, with such a record as his, in obtaining registration on the basis of what amounted to a fraudulent application and (secondly) how dramatically the screening methods available to Registrar have improved in recent months. The latter observation will serve as a warning to others.

The Tribunal notes additionally, and with approval, the Assistant Registrar's remarks, contained in his testimony, that in any case where an applicant for registration makes full and candid disclosures of his or her past difficulties, where they exist, such disclosure would not automatically result in the rejection of his or her application but that the Registrar in all probability would have called in such an applicant for an interview during which a rational and amicable attempt would have been made to reconcile the facts of the applicant's case with his or her legitimate aspirations and if possible hammer out a workable working arrangement.

The Tribunal also notes in passing the provisions of Section 10 of the Real Estate and Business Brokers Act:

> 10. A further applicaton for registration may be made upon new and other evidence or where it is clear that material circumstances have changed.

The Tribunal hopes that the above Section will offer the Appellant some hope that by reforming his ways and discharging his debts the possibility of a brighter future should not be beyond the scope of his reasonable ambition.

In the meantime, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOSEPH A. MORRISSEY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOSEPH STRUNG, MEMBER

COUNSEL: JOSEPH A. MORRISSEY, appearing in person

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 16th November, 1984

DECISION AND ORDER (CONSENT)

UPON the application to the Tribunal by the Appellant Joseph A. Morrissey and the Respondent for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Consent dated the 16th day of November, 1984 to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Appellant Joseph A. Morrissey, and by the Respondent, filed and attached hereto.

NOW THEREFORE this Tribunal doth order that the proceedings in this matter be and the same are hereby disposed of without a hearing as against the Appellant, Joseph A. Morrissey on the basis of the terms and conditions and Agreement set out in the Consent attached hereto and which is expressly made a part of this Order and Decision.

RONALD W. NORTHOVER

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
WILLIAM J. BINGLEY, MEMBER

COUNSEL: L. G. FRANKS, agent for Ronald W. Northover

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 16th May 1984

REASONS FOR DECISION AND ORDER

The Appellant, a man of 60-odd years, had an unblemished record as a registered real estate salesman. He left that industry (in respect of which his registration lapsed) to enter another regulated industry becoming a registered builder under the Ontario New Home Warranties Plan Act - with disastrous consequences in that at the end of one year he had defaulted on four construction contracts in respect of which the Guarantee Fund established under the Ontario New Home Warranty Plan Act lost some $14,000. His registration as a builder was revoked; his indebtedness to the New Home Warranty Program remains outstanding. And now he appeals from the refusal of the Registrar of Real Estate and Business Brokers to re-register him for so long as his debt to the Warranty Program rests unpaid.

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

The overriding consideration in this case has to do with whether a person will be granted registration who has already established an extremely unsatisfactory record in one of the other industries. Now we have great sympathy for a person who has reached the age of sixty, who has entered the seventh decade of life, and who is trying to find a way of maintaining himself and his dependents. We feel it is a great pity that Mr. Northover is not going to be permitted to act as a real estate salesman. If the facts were otherwise than as they have been disclosed by the evidence which has been set before us, we would be extremely reluctant indeed to interfere with his ability to support himself. But the decisions of this Tribunal are reported and circulated very widely throughout the Province and particularly among those who practice in the various regulated industries. In this case, if this appeal were allowed, the Tribunal would be sending a signal to the effect that individuals who owe large sums of money to a guarantee fund which has been established in one of the interrelated industries may yet be permitted to go into another industry notwithstanding those undischarged obligations. It would be as though, to set before you a rather gross analogy, a person could go into a department store, run up and then refuse or otherwise fail to pay a debt in one department of the store and then go into another department or another branch of the same establishment and receive credit. It would not be appropriate.

There is also the question of Mr. Northover's capacity to handle money or the likelihood that he would be likely to handle money with integrity or in a way which would be satisfactory to the Registrar.

The Tribunal wishes to make it entirely clear to Mr. Franks that it is obliged to him for his attendance. He has appeared and said as much as he could on his friend's behalf.. We regret our inability to help Mr. Northover but the Registrar's Proposal seems eminently proper to the Tribunal and it has no alternative but to uphold it.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

GREGORY J. O'BRIEN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
DWIGHT LANDON, MEMBER

COUNSEL: FREDERICK L. CARRUTHERS, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 5th July, 1984

DECISION AND ORDER

UPON the application to the Tribunal by the Appellant Gregory J. O'Brien, and the Respondent for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, and having read the Consent Order dated the 4th July, 1984 to the disposition of the proceedings without a hearing as evidenced by the execution thereof by the Appellant Gregory J. O'Brien, and by the Respondent, of a letter of agreement being Exhibit 5 executed 5th July, 1984, filed and attached hereto.

NOW THEREFORE this Tribunal doth Order that the proceedings in this matter be and the same are hereby disposed of without a hearing as against the Appellant, Gregory J. O'Brien on the basis of the terms and conditions and Agreement set out in the Consent order attached hereto and which is expressly made a part of this Order and Decision.

July 4, 1984

Mr. Frederick L. Carruthers
Barrister and Solicitor
Suite 1405
480 University Avenue
Toronto, Ontario
M5G 1V6

Dear Sir:

Re: Gregory J. O'Brien
Proposal to refuse registration as real estate salesman
Hearing - July 5, 1984

Further to your telephone conversation with Mr. S. Austin, Division Counsel of July 4, 1984, I would like to confirm the following points:

1. Gregory O'Brien hereby consents to the Registrar carrying out his Proposal dated February 24/84.

2. You have advised, on behalf of your client, that your client will be fully discharged from Parole Supervision on May 17, 1985.

3. Your client completed all education requirements approved by Registrar, as provided in section 14 of Regulation 891, R.R.O. 1980, on October 11, 1983, with the Ontario Real Estate Association.

4. Accordingly, pursuant to section 14(2) of the Regulations, your client would be required to pass the written examination(s) approved by the Registrar after October 11, 1984. However, your client would not be required to retake the required course(s) of study approved by the Registrar until after April 11, 1985.

5. It is agreed that should your client retake and pass the written examination(s) approved

by the Registrar after March 11, 1985 but before April 11, 1985, the Registrar would be prepared to consider a further application for registration from Gregory J. O'Brien, pursuant to section 10 of the Real Estate and Business Brokers Act, on or immediately after May 17, 1985, provided that Gregory J. O'Brien is fully discharged from Parole Supervision by that effective date.

6. Further, in support of a further application for registration as hereinbefore mentioned, Gregory J. O'Brien will be required to submit to the Registrar satisfactory evidence, in the form of two credible character references from sources unrelated to him (a physician and lawyer) who are completely familiar with his personal situation, that he no longer suffers from addiction to alcohol.

Yours truly,

signed: J. R. Cook
J. R. Cook
Registrar
Real Estate and Business Brokers Act

SAA:gh

I, Gregory J. O'Brien, hereby acknowledge that I have read the above-noted terms and conditions, which have been explained to me by my counsel and fully understand and agree to the same being incorporated into a Consent Order to be issued by the Commercial Registration Appeal Tribunal on July 5, 1984.

signed: G. O'Brien, July 5/84

Gregory J. O'Brien

SOUTHCOVE INVESTMENTS INC. and
GARY R. McCOLL and
SAM CHIANELLI

APPEAL FROM THE ORDER OF THE REGISTRAR UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT

TO CEASE IMMEDIATELY MISLEADING ADVERTISING

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
FRANK BELL, MEMBER

COUNSEL: GARY R. McCOLL, on behalf of himself and all Appellants herein

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 22nd October, 1984

DECISION AND ORDER

UPON this matter coming before the Commercial Registration Appeal Trubunal on the 22nd day of October, 1984;

AND UPON the Appellant, Gary R. McColl, on behalf of himself and all the other Appellants herein withdrawing this appeal, and by virtue of the authority vested in it by Section 9 of the Real Estate and Business Brokers Act, the Tribunal orders that the Registrar's Order, dated April 25, 1984, become final.

JOHN RICHARD LELAND TEW

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
WILLIAM J. BINGLEY, MEMBER

COUNSEL: WAYNE HOLMES, representing the Appellant

STEPHEN MARTIN, representing the Respondent

DATE OF
HEARING: 5th September, 1984

REASONS FOR DECISION AND ORDER

This has been an interesting case in at least one aspect, in that it discloses an apparent flaw in the Registrar's standard form of application for registration or renewal, the result of which is that it seems to make it possible for an applicant to have a separate identity from that of what one might call a personal corporation through and by means of which he had been carrying on business or otherwise carrying on exceptionably at a prior time in his past.

Question 4 of the form reads:

> a) Are you registered, or have you ever been registered, under this or any other Acts? If yes, give full particulars. NOTE: "Any other Acts" pertains to those Acts listed on page one of this form and any other Acts requiring registration under any provincial statute.
>
> b) Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body.

Question 6 of the form reads:

> Are there any unpaid judgements outstanding against you? If yes, submit a copy of each judgement. State amount outstanding and repayment arrangements on separate sheet.
>
> YES NO

In each case the Appellant, as applicant for a real estate salesperson's registration answered the question "no" and he was quite possibly justified in so doing because it was not Mr. Tew but Tew Travel Inc. which had a large judgment registered against it and which had previously been registered and which registration had previously either been revoked, suspended or cancelled. In fact the registration had been voluntarily cancelled and that the compensation fund established under the Travel Industry Act sustained a loss of some $17,517.10 due to the defaults of Tew Travel Inc. to its customers in circumstances the Tribunal considers most unadmirable.

The Registrar of Real Estate and Business Brokers testified that it was not the Appellant's minor criminal record which concerned him but his non-disclosure of the financial matters. The Appellant argued that he had not committed the offence of non-disclosure.

The Tribunal holds that notwithstanding the technical or exact accuracy of this assertion, the provisions of Section 6(1)(a) and (b) are sufficiently flexible as to permit the Registrar's Proposal to succeed.

The words "reasonable grounds for belief" refer to the belief of the Registrar, or on appeal, pursuant to Section 9(4) of the Act, the belief or opinion of the Tribunal.

The words "past conduct of the applicant" in the Tribunal's opinion (as evidently they were, as well, in that of the Registrar) include his past conduct as sole officer and director - in short, as operator - of Tew Travel Inc. which, as we have indicated, was what might be called a "personal company", i.e., in the sense that it was a company that was a mere extension of himself or a corporate shell or a corporate entity functioning protectively for him.

Perhaps the nub of the question for us to decide is whether or not the Tribunal will accept what we might call the legal fiction of a separation between the entity of Tew's Company and the entity of Tew personally. For some purposes, the separateness of two entities such as these is no doubt an unimpeachable proposition. But not, in the opinion of the Tribunal, for the purposes of Section 6(1).

The highly colourable record of Tew Travel Inc., which was directed and presided over and operated by Tew the man, attaches to Tew personally because of the nature and quality of his association with Tew Travel Inc. Be it noted that in another case a director or officer of a Company might not be similiarly found to be effected, depending on the specific facts of it.

In the Tribunal's opinion, and it so finds, Mr. Tew is not fit for registration on the grounds set forth by the Registrar at both subparagraphs (a) and (b) of his Reasons for Proposal because of the close nature of his involvement and association with Tew Travel Inc. which certainly would not have been granted registration under the Real Estate and Business Brokers Act had it been the Applicant.

It is a pity that the facts concerning the Applicant's involvement with Tew Travel Inc. did not come to the Registrar's attention before Mr. Tew had laid out time and money, in taking and passing the Real Estate salesperson's course, and Mr. Tew's misfortune was probably in large measure due to the form's failure to contemplate the particular situation which has arisen in this case. There seems to have been a misunderstanding. Perhaps if Mr. Tew had had a little more imagination he would have disclosed his involvement with Tew Travel Inc. to Mr. Coleclough earlier than he did and before it came to Mr. Coleclough's attention as it did. It would have been a very candid thing to do. Perhaps more candid than reasonable. We don't know.

However, the Tribunal finds that Mr. Tew's past conduct - as the mind behind and/or the person responsible for Tew Travel Inc., which disappeared in view of circumstances which left - the compensation fund established under the Travel Industry Act at a loss for some $17,500.00 - has been such as to fully justify the Registrar's decision which the Tribunal certainly does not see fit to interfere with.

The Tribunal has heard no mention during the course of Mr. Tew's testimony or otherwise of the possible repayment of the amount lost by the Travel Industry Compensation Fund. The Tribunal would remind the Appellant of the provisions of Section 10 of the Real Estate and Business Brokers Act.

We do not know what the Registrar's attitude would be towards the Appellant if the amount lost by the Travel Industry Compensation Fund were repaid. Perhaps the parties could canvass this at a later date at their mutual convenience. However, for the present and pursuant to and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

By way of what we would call an obiter dictum - and nothing more because the Tribunal would not overstep its jurisdiction - we would suggest that the Registrar consider the amendment of his form so as to avoid for the future the kind of problem or misunderstanding which has been evident in this case.

ALITOURS INC.

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

DETERMINING CLAIM NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA J. SHAND, MEMBER
ART GARNER, MEMBER

COUNSEL: CHRISTOPHER D. BREDT and
ROBERT BELL, representing the Appellant

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF
HEARING: 24th September, 1984

TRIBUNAL RULING AND REASONS

The Appellant Alitours Inc. is registered under The Travel Industry Act as a travel wholesaler. Chieftain Holidays Ltd. was a travel wholesaler which went into receivership November 1983. In essence Alitours Inc. paid a deposit for travel services of $50,000.00 to Chieftain Holidays Ltd. prior to the receivership and applied to the Board in April of 1984 for compensation.

It is agreed by both counsel for the Appellant and the Board that the money was a deposit and it was not consumer's money.

Counsel for the parties have agreed that a preliminary question of law should be determined by the Tribunal. Is Alitours Inc. a "client" within section 15 and therefore entitled to compensation. It is clear that section 15(2) precludes compensation to the Appellant on that basis. The Tribunal is of the opinion that section 15(2) delineates the entitlement of travel agents and if the Appellant fails to come within that section, it cannot by an expanded definition of client come within the definition of section 15 subsection (1).

We are of the opinion that the deletion in the Regulation in November 1982 of the phrase "subject to subsection (2)" does not extend the entitlement of travel wholesalers to compensation. We find that the Appel'ant is not a client pursuant to section 15(1). The answer to the question is in the negative.

MANILA INTERNATIONAL TRAVEL AGENCY LTD.

APPEAL FROM AN ORDER AND PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO TEMPORARILY SUSPEND THE REGISTRATIONS
TO REVOKE THE REGISTRATIONS

MANILA INTERNATIONAL TRAVEL AGENCY LTD., Appellant
THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT, Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN, AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
GLORIA ANEVICH, MEMBER

COUNSEL: ISABELLE RAMOS, its agent

A.N. MAJAINA, representing the Respondent

DATE OF
HEARING: 12th December, 1984

ADJOURNMENT AND ORDER

UPON the matter coming before the Tribunal and upon commencement of the hearing and

UPON the request for an adjournment by the Appellant and the concurrence of counsel for the Registrar subject to certain conditions, the Tribunal Orders as follows:

The temporary suspension is hereby extended indefinitely until the matter is brought forward for hearing by the Tribunal and thereby concluded. The Registrant, Manila International Travel Agency Ltd. shall not at any time or under any circumstances directly or indirectly carry on any new business subsequent to the date of the Registrar's Order of November 15, 1984 and while this ORDER is in effect,

This hearing is adjourned sine die to be brought back on 3 days' notice one Party to another.

MAHESH PARIKH and BHARAT CHOKSHI operating as
ASIA TRAVELS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION AS TRAVEL AGENT

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
KEITH COPPARD, MEMBER

COUNSEL: ALAWI MOHIDEEN, representing the Appellants

A. N. MAJAINA, representing the Respondent

DATE OF
HEARING: 13th December, 1984

ADJOURNMENT AND ORDER

UPON the matter coming before the Tribunal and upon commencement of the hearing and

UPON the request for an adjournment by counsel for the Appellant and the concurrence of counsel for the Registrar subject to certain conditions, the Tribunal Orders as follows:

The temporary suspension herein is hereby extended indefinitely until the matter is brought forward for hearing by the Tribunal and thereby concluded. The Registrant Asia Travels shall not at any time or under any circumstances, directly or indirectly, carry on any new business subsequent to the date of the Registrar's Order of November 23, 1984 and while this ORDER is in effect,

This hearing is adjourned to a date to be determined without delay by the Registrar of the Tribunal.

JACK B. AND DONA C. LEUE

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS:

Professional Seminar Consultants, Ltd. (PSCL) is a Canadian corporation incorporated on the 5th February 1971.

PSCL was registered under the Travel Industry Act of Ontario commencing 29th August, 1975. The registration was terminated on the 15th April, 1977 and continues to be terminated. PSCL was a participant in the Compensation Fund under the Act until 15th April, 1977 and is no longer a participant in the Fund.

An Annual Summary return under the Canada Corporations Act (Ex. 9) filed 9th June, 1976, shows as of 31st March, 1976:

Mailing address and postal address of Head Office:
261 Montreal Road
Ottawa, Ont. (Ottawa)

Director's names and postal addresses:
Marvin Weisberg (Weisberg)
118-17 Union Turnpike
Forest Hills, N.Y.

Howard Byrman(sic) (Bryman)
3978 Carrel Blvd.
Oceanside, N.Y.

Edward Notkin
8610 - N.W. 12th Street
Plantation, Florida

An Annual Information Return under the Ontario Corporations Information Act as of Feb. 5th, 1976 shows PSCL:
Mailing address of:
3194 Lawson Blvd.
Oceanside, N.Y. (Oceanside-3194)
Directors as set out in Ex.9 above.

A letterhead (PSC logo - Ottawa address) of PSCL (Ex.10 27 August 1976) shows the name of the company as follows:

-'Professional' superimposed on an globe with a large blue P.,
'Seminars' on such a S,
'Consultants' on such a C, (PSC Logo)
and Ltd. outside the logo.
-under that name:
"Liaison for International Professional Education
New York.Ottawa.Paris"
-at the top right corner the address:
Tel: 613-741-3700
261 Montreal Road,
Ottawa, Ontario (Ottawa)
-across the bottom of the letterhead:
"International Congresses.Scientific Meetings.
Clinical Study Tours"

Another format (Ex.88b, 6 December 1976) of the above has 3 addresses as in Ex. 96.

Another format of the letterhead (Ex.13B April 14, 1977) (Ottawa address below name-no PSC logo) does not have the PSC logo; a different version of this letterhead (Ex.13A April 15, 1977) has New York and Paris blanked out. Another letter of PSCL (Ex.15, 15 October 1976) has no letterhead.

Another letterhead (triple address - no PSC logo) of PSCL (Ex. 96) of 22nd February 1977 has
- deleted "Paris" and inserted "San Francisco.Tokyo"
- at the top corner:

"Please reply to:
261 Montreal Road, Suite 204
Ottawa, Ont. Canada
tel:(613)741-3700 (Ottawa)
3194 Lawson Blvd.
Oceanside, N.Y. (Oceanside 3194)
tel:(516)764-5100
1255 Post St.
San Franciso, California (Post S.F.)
tel:(415)673-3850

- at the bottom left, a logo with:
  "Member American Society of Travel Agents"
- across the bottom:

"International Congresses.Professional Association
Study Tours.Group Travel Specialists "

Professional Seminar Consultants Inc. (PSCI) is a U.S. Corporation with a mailing address of:

"Marvin Weisberg, (Weisberg)
3194 Lawson Blvd.,
Oceanside, N.Y.". (Oceanside 3194)

PSCI had a letterhead (Ex.19a 15 April 1975, Ex.19b 8 June 1976) identical to PSCL, except as to "Inc." outside the PSC logo, and address - Oceanside 3194.

PSC Tours Inc. (PSCTI) is a U.S. Corporation with a mailing address:

3200 Lawson Blvd.
Oceanside, N.Y. (Oceanside 3200)

PSCI and PSCTI were never registered nor participants in the Compensation Fund under the Travel Industry Act of Ontario.

Daniel E. Collins (Collins), who in 1973 had been chairman of the Travel Committee of the Bar Association of San Francisco, acted initially with PSCI Oceanside 3194 stationery (Exs. 19a April 15, 1975, 19b June 8, 1976). He utilized the San Francisco address of 1255 Post Street, (Post S.F.) which was an office of minimal facilities.

The Tribunal is of the opinion Professional Seminar Consultants (PSC) would appear to be a roof (umbrella) organisation under which various corporations acted in name or concert with respect to general tour arrangements with suppliers.

PSC was reorganized effective July 1, 1976: "'(Bryman)' will own all stock in PSC Ltd. Canada, California and Toyko. PSC New York and PSC Europe will be individually owned by others as well as PSC Tours Inc.... We will still operate under one roof...Dan Collins will be calling you regarding these programs." (Excerpt from Bryman letter - See Ex.76 - May 19, 1976). It took a while for the reorganization to be delineated in stationery, etc., (see above exhibits of letterheads).

BACKGROUND FACTS HEREIN

Associated Building Industry of Northern California (ABI) is a non-profit organization organized to serve those in Northern California engaged in the building industry, in industry matters (Building Code, Regulations, recreation, etc.)

ABI was never registered under the Travel Industry Act of Ontario nor a participant in the Compensation Fund.

In April 1974 some 100 California builders and families made a trip to Russia "in the first ABI sponsored USSR Study Tour" with a Canadian (B.C.) teacher's group.

Early in 1976 Collins initiated an agreement with Gordon Blackley (Blackley), Executive Vice-President of ABI with respect to a tour to Russia. The Tribunal is of the opinion that Blackley and ABI are synonymous in this matter.

The Tribunal finds that Blackley was dealing with Bryman "who had a Canadian Travel Operation", and he was unaware of PSCI or PSTI. This finding is not a necessary determinant in this matter.

On 27th August 1976, Bryman wrote Blackley (PSC logo - Ottawa address - Ex.10), "I have Dan Collins' letter of August 24th, and needless to say I am delighted that you are once again doing business with us...." The arrangement is set out in a Memorandum to Bryman PSC from Blackley dated 18th February, 1977 (Ex. 12):

"....the following PROPOSAL REGARDING EXPENSES AND INCOME SO THAT I can get a better handle on the amount of income to the association these tours will generate - a question raised not infrequently by my board of directors.

1. ABI will pay printing and mailing costs of $1,223.78 (cost breakdown accompanied my 1/31/77 letter)
2. ABI to receive cash equivalent of 1/40th of tour selling price for each tour participant = $32.35 per head.
3. ABI to receive $25.00 seminar fees.
4. Gordon & Rebecca Blackley's participation in S.F. Bar Assoc. Group Tour complementary.

If we get 60 people on the tour, and of (sic) half of them pay the seminar fee, about $1,400 would be generated for the ABI - a sum which would help convince my directors that allowing me to get involved in the tour business every two years or so maybe isn't such a bad idea after all. "

An awareness by members of ABI and related persons with respect to a tour plan came about by the receipt of one or more items from a packet of 3 documents. (I-II-III)

(Ex. 11A and 22LE1)

I. An "ATTENTION: CALIFORNIA NAHB MEMBERS" letter of information on the letterhead of ABI (Ex. 11A) stating inter alia:

> "We are pleased to announce Phase 2 of our Association sponsored Study Tours Abroad...
>
> ....
>
> In April 1974, more than 100 California builders and their families flew from San Francisco to Russia in the first ABI Sponsored USSR Study Tour.
>
> ....
>
> Working with PROFESSIONAL SEMINAR CONSULTANTS, the same organization which served us so well in 1974...
>
> ....
>
> ...$1,295 (+15% tax & tips) for the travel and accomodations plus $25.00 for the Conferences and Seminars portion of the study tour...
>
> ....
>
> Detailed trip information and visa application forms will be sent to you upon receipt of your deposit. Should you require additonal information please contact:

PROFESSIONAL SEMINAR CONSULTANTS, 1255 Post Street
San Francisco, CA. Telephone(415)673 3850

Sincerely,

"Gordon Blackley"
Gordon Blackley CAE
Executive Vice President "

II. A general colourful brochure (Ex.11Ci and 22 LE2)

"TRANSCAUCASIAN ODYSSEY"

with the following specifics added:

"INCLUDING BUILDING CONFERENCES

....

YOUR INVITATION TO JOIN
IN A SOVIET/AMERICAN
CONSTRUCTION INDUSTRY STUDY TOUR SPONSORED BY
ASSOCIATED BUILDING INDUSTRY
FOR BUILDERS, THEIR FAMILIES AND FRIENDS"

and on the back page, in fine print relating to general provisions:

" ....

RESPONSIBILITY: PSC Tours, Inc. and/or its Agent act(s) as Agent for the various companies whose accommodations.....

.... "

and at the bottom:

Program Arranged by:
Professional Seminar Consultants Ltd.
1255 Post Street, San Francisco, Ca.

III REGISTRATION FORM (EX. 11B)

ABI

Professional Seminar Consultants Ltd.
1255 Post St.
San Francisco, Calif.

Gentlemen:

Please make the following reservations for me for the tour as sponsored by the ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA.

....

PAYMENT (check one)

Enclosed you will find my check for $_________ which represents full tuition and payment for my entire party.

Enclosed you will find my cheque for $_________ which represents a deposit of $200.00 for each member of my party. I will pay the balance no later than six (6) weeks before the date of departure

NOTE: Make all checks payable to the PROFESSIONAL SEMINAR CONSULTANTS LTD. Please read and sign the conditions on the reverse side so that we may process your reservation.

....

(on reverse side) CONDITIONS

....

SEMINARS: $25.00 Tuition Charge made payable to ABI "

....

Up to this time ABI through Blackley had performed many acts which a travel agent would in the ordinary course peform in arrangements for a tour, such as preparation of the above material, mailing list, receiving registrations, etc. Material was prepared by using as precedents material from other group tours with appropriate changes being made (See Ex. 14 and 18).

All the details related to the trip are set out in the above three documents and many relevant details are repeated in each.

SEQUENTIAL EVENTS:

The packet came to the attention of Mr. Jack B. Leue (Leue) of Fair Oaks, California. Leue was a member of the Sacramento Association. Leue on behalf of himself and his wife completed a REGISTRATION FORM and mailed it to Post S.F. together with a cheque payable to PSCI for $400.00. The cheque was processed by CIBC, Toronto Data Centre on 4th February, 1977.

On or about, 2 February 1977, in an envelope from PSCL Ottawa, (Ex. 22LE6) Leue received a letter of acknowledgement (triple address - no PSC logo) (Ex. 22LE7) which stated:

> " TOUR ABI - RUSSIA
>
> ....
>
> We were delighted to receive your cheque and reservation for the tour listed above...."

Details respecting the trip are set out in the letter. The letter concluded

> "...if you require additional information please do not hesitate to contact us "

and was signed by Maureen De Lottinville, Office Manager. The Ottawa address reply box was ticked.

Also enclosed were:

- a colour photo sheet with PSC logo (Ex.22LE9) headed "Trip Information For"
- trip insurance ("Trip Travel and Baggage Protector") application forms identified with PSC logo plus Insurance Dept. PSCI with a New York addressee and the cheque to be paid to PSCI (Ex.22LE8ABC)
- an advice form respecting accompaniment directed to PSCL Ottawa (Ex.22LE10)
- miscellaneous information sheets (Ex.22LE13A-B, 22LE14, 22LE15) (some in English on one side French on other)

On or about the 22nd February 1977, Leue received a (triple address - no PSC logo) letter with Ottawa address box ticked directed "TO ALL REGISTRANTS OF THE TRANSCAUCASIAN ODYSSEY" stating inter alia the following "Your departure date is indicated on your billing enclosed". There was enclosed a bill as follows:

"PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Mr. & Mrs. J.B. Leue
STATEMENT
TRANSCAUCASIAN ODYSSEY MAY 11, 1977

Cost of tour	$1295.00	
15% tax & service	174.25	
Registration fee	25.00	
Visa handling	15.00	
Total	1509.25	
INCREASE	36.37	x 2 72.74
Total	1545.62	
Less deposit	200.00	x 2 PAID
BALANCE DUE	1345.62	x $2691.24 DUE

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

On 11th March, 1977, PSCL (triple address - no PSC logo) advised Leue - "Dear Participant" of the increase ($36.37) in fare.

On the 24th March Leue mailed to Ottawa a cheque payable to PSCI for $2,691.24. The cheque was deposited by PSCL and processed by CIBC, Toronto, Ontario, City.

There was also a memo "VISA APPLICATION FORMS for the U.S.S.R." from PSCL (Ex.22LE19) which directed:

> "Please enclose a check for $15.00 PER PERSON payable to Professional Seminar Consultants Ltd. to cover the costs of the visa fee and visa handling charges."

The form was in English with French on the reverse. On the 1st April, Leue mailed a cheque payable to PSCL for $30.00 for visa fee and handling charges. The cheque was processed in Toronto by CIBC.

Leue did have knowledge that PSCL was a Canadian Company based in Ottawa. In the course of their dealings, Leue telephoned Ottawa five times. This finding is not a necessary determinant in this matter.

On the 14th April, 1977, Leue was advised in a letter (Ex.22LE20a) (Ottawa address - no logo) postmarked Ottawa (Ex.22LE20c) addressed to "Dear Registrant" that "P.S.C. Ltd., has had its license revoked by the Ontario Ministry of Consumer and Commercial Relations due to insolvency". Reasons were given for the insolvency, and a direction to contact the Ministry.

A copy of this letter had been sent (jointly) to Hackett, Grayson, Kay, Jackson, Blackley (Ex.13A).

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the claimant, under the Travel Industry Act.

REASONS HEREIN:

The Tribunal is of the opinion that the legal provision relevant to the resolution of the issues herein is set out in Section 15 of the Schedule to the Regulations under the Travel Industry Act. For entitlement to a refund of moneys the claimant must bring himself within the provisions of Section 15(1), paragraph (1), namely:

> "A client who has made payment for travel services to a participant in Ontario..."

Counsel for the Respondent has argued that the Tribunal must determine "What is the law that governs the contract" or (put in different terms), "What is the proper law of a contract". The Tribunal is of the opinion that this is not an issue that must necessarily be decided by it. It is not necessary that the Tribunal decide that the Ontario law of contract is applicable. What is to be decided is whether the claimant can bring himself within the compensation provisions of the Regulations under the Travel Industry Act.

Whether there is entitlement to relief within another jurisdiction such as California is not relevant to the determination of the issue whether the claimant is entitled to relief under the law including statutory provisions of Ontario.

It is not a question of whether the Travel Industry Act of Ontario is the proper law which governs the contract relationship between the claimant and PSCL but whether under the Travel Industry Act, the claimant is entitled to a refund from PSCL.

What is required is that there be a contract for travel services between the claimant and the participant and that payment be made (to the participant) in Ontario.

The Tribunal is of the opinion that the claimant was a 'client' of PSCL.

The Tribunal finds that the relationship between the claimant and ABI was at all times member and association - that the action of ABI with respect to the tour, its 'sponsorship' of a study tour was of an association carrying out functions which the members as such had accepted in the ordinary course of having such relationship and being so represented. That the Claimant herein was not a member of the association is of no relevancy; he had placed himself in this matter in the position of a member.

It is clear from the letter of information, the brochure, the Registration Form that ABI made it clear that a relationship was to be established between the Claimant and PSCL:

> "Working with Professional Seminar Consultant the same organization that served us..."
>
> "Please contact: Professional Seminar Consultants"
>
> "Program arranged by Professional Seminar Consultants Ltd."
>
> 'Professional Seminar Consultants Ltd.' heading on Registration Form.
>
> "...cheques payable to Professional Seminar Consultants Ltd."

It is noted that, though not a necessary determinant, the total payment could be made to PSCL.

The payment of $25.00 Tuition Charge is in keeping with the member-association relationship.

The Tribunal is of the opinion that the actions of ABI herein do not constitute "carrying on the business of selling to the public travel services provided by another person". ABI did not intend its actions to be such, nor did the claimant understand its actions as such. The receipt by ABI of the $25.00 seminar fee and other remuneration, direct and indirect, does not make the actions a carrying on of business.

ABI was acting on behalf of its members in respect of the tour. That the claimant perceived some obligation on the part of ABI is a fact; the nature and extent of that obligation is not relevant to this claim under the Travel Industry Act of Ontario.

The Tribunal finds that ABI was not acting as a travel agent herein. Accordingly ABI was not an "unregistered" travel agent.

The Tribunal is of the opinion that the most significant item is the letter of acknowledgement (Ex.22LE7); whatever lack of clarity there may have been upon the forwarding of the Registration Form as to with whom the relationship was to be established, it was dispelled upon receipt of this letter. It was PSCL operating in the matter from the Ottawa (Ontario) address. The Tribunal is not called upon to determine issues that might have arisen had the matter come to an end after the mailing of the Registration Form; nor indeed after the receipt of the letter of acknowledgment. The issue, herein, is to be determined as of the default of the participant which occurred.

When the claimant received Ex.22LE17(a) and 22LE17(b), and responded to the billing of PSCL in Ottawa (Ontario) by a cheque - a contractual relationship had been established between the claimant and PSCL for the travel services theretofore established in total by the various communications. The Tribunal finds that the claimant (a client) had contracted with a participant for travel services.

The Tribunal finds that the claimant (client) made payment to a participant. The cheques for:

balance billed for
increase in fare

had clearly been paid to a participant in Ontario for the cheques had been mailed to the participant in Ontario as directed by the participant and negotiated in Ontario. The Tribunal is of the opinion that the claimant's deposit cheque having been forwarded (without being negotiated in California) on behalf of the claiment to Ontario where it was accepted and negotiated by a participant constituted payment to a participant in Ontario. The Tribunal is of the opinion that there is no significance to be attached to the claimant having made the cheque payable to PSCI.

The Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal is of the opinion that:

(a) Registration (tuition) fee in respect of direct educational aspect of a trip which are related to a vocation, profession, etc. is not a travel service; [any sum so claimed should be deducted from the amount claimed]

(b) Visa handling is not a travel service but is a service which is an adjunct service in a travel business operation;
[any sum so claimed should be deducted from the amount claimed]

(c) The provision of a travel wallet is not a travel service but the provision of an article useful but not necessary in travel;
[the sum of $13.00 therefor should be deducted from the amount claimed]

(d) A tax is not travel service (a reiteration of the Tribunal's earlier decision).
[Herein the sum of $3.00 should be deducted from the amount claimed.]

(e) Payment of tips and gratuities are payments for travel services. Tips and gratuities are such an integral part of travelling that whether they are in fact to be paid at discretion, or form part of the charge of the service supplier, or even if they are in respect of travel where it is alleged that tips and gratuities are not accepted, or, required, or even forbidden, if they are included in the charge to the client, payment therefore is in fact payment for a travel service.

The Tribunal reiterates its decision *Re Battista (Strand Holidays) 10 C.R.A.T., p.156* and in *Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212*.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim, namely: $3,121.24 less $50.00 tuition fee - less $60.00 (2 x $15.00 + $30.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

DOUGLAS H. AND KATHRYN CALDWELL

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS, BACKGROUND FACTS, AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto, background facts and the sequential events therein (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

SEQUENTIAL EVENTS:

The colourful brochure also came to the attention of Mr. and Mrs. D.H. Caldwell (Caldwell) of Fair Oaks, California. Caldwell was not a member of ABI; he obtained a invitation and Registration Form through Leue-Claimant who was a member of the Sacramento Association.

On the 21st January 1977, Caldwell on behalf of himself and his wife completed a Registration Form and mailed it together with a cheque payable to PSCL for $400.00. The cheque was processed by CIBC, Toronto Data Centre.

As had Claimant-Leue:

- On or about, 2 February 1977, in an envelope from PSCL Ottawa, (Ex.23a) Caldwell received a letter (triple address - no PSC logo) of acknowledgement (Ex.23b) which stated:

" TOUR ABI - RUSSIA

....

We were delighted to receive your cheque and reservation for the tour listed above...."

Details respecting the trip are set out in the letter. The letter concluded

"...if you require additional information please do not hesitate to contact us "

and was signed by Maureen De Lottinville, Office Manager. The Ottawa address reply box was ticked.

Also enclosed were:

- a colour photo sheet with PSC logo (Ex.23c) headed "Trip Information For"
- trip insurance ("Trip Travel and Baggage Protector") application forms identified with PSC logo plus Insurance Dept. PSCI with a New York addressee and the cheque to be paid to PSCI (Ex.23d)
- miscellaneous information sheets (Exs. 23e, 23f, 23g, 23h, 23j, 23k). Also note re filling Visa Applications (Ex.23i) (some in English on one side French on other)

On or about the 22nd February 1977, Caldwell (as had Claimant-Leue) received a (triple address - no PSC logo) letter with Ottawa address box ticked directed "TO ALL REGISTRANTS OF THE TRANSCAUCASIAN ODYSSEY" stating inter alia the following "Your departure date is indicated on your billing enclosed". There was enclosed a bill.

On March 11th, 1977, PSCL (triple address) advised Caldwell - "Dear Participant" of the increase ($36.37) in fare.

Caldwell mailed to Ottawa a cheque payable to PSCI for $2,661.24. The cheque was deposited by PSCL and processed by CIBC, Toronto, Ontario, City.

Caldwell received visa application forms (identified with Russian Travel Bureau Inc. New York) completed together with instruction sheet. The sheet referred to "passports..., valid..., returning to Canada" and "Visa handling fee...to PSC". [The Tribunal notes that apparently inadverently the application form referred to Group Alameda City Dental]
The form was in English with French on the reverse. Caldwell mailed 2 cheques payable to PSCL for $15.00 each. The cheques were deposited by PSCL and processed in Toronto by CIBC.

On the 14th April, 1977, Caldwell was advised (as had Leue-Claimant) in a letter (Ex.35) (Ottawa address) postmarked Oceanside (Ex.36) addressed to "Dear Registrant" that "P.S.C. Ltd., has had its license revoked by the Ontario Ministry of Consumer and Commercial Relations due to insolvency". Reasons were given for the insolvency, and a direction to contact the Ministry.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the claimant, under the Travel Industry Act.

REASONS:

Based on the Reasons set out in Leue-Claimant, the Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decision in Leue-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim, namely: $3,091.24 less $50.00 tuition fee - less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

W.F. GAEUMAN

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS, BACKGROUND FACTS, AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto, background facts and the sequential events therein (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

SEQUENTIAL EVENTS:

The colourful brochure also came to the attention of William F. Gaeuman (Gaeuman) of Oberlin, Ohio. Gaeuman was not a member of ABI; he was a member of the National Organization and a life director thereof. He got notice through a brochure and obtained an invitation and Registration Form.

On or about 3rd February 1977, Gaeuman on behalf of himself and his wife issued a cheque payable to PSCL for $400.00. The cheque was deposited by PSCL and processed by CIBC, Toronto Data Centre.

On or about the 22nd February 1977, Gaeuman (as had Claimant-Leue) received a (triple address - no PSC logo) letter (Ex.37) with Ottawa address box ticked directed "TO ALL REGISTRANTS OF THE TRANSCAUCASIAN ODYSSEY" stating inter alia the following "Your departure date is indicated on your billing enclosed". There was enclosed a bill (Ex.40).

"

PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Mr. & Mrs. W. Gaeuman
STATEMENT
TRANSCAUCASIAN ODYSSEY MAY 11, 1977 NEW YORK

Cost of tour	$ 995.00	
15% tax & service	149.25	
Registration fee	25.00	
Visa handling	15.00	
Total	1184.25	
INCREASE	200.37	x 2 PAID
Total	984.25	
Less deposit	36 37	x 2 72.74
BALANCE DUE	1020.62	x $2041.24 DUE

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

On March 11th, 1977, PSCL (triple address) advised Gaeuman - "Dear Participant" of the increase ($36.37) in fare (same as Leue-Claimant)

Gaeuman mailed to Ottawa a cheque payable to PSCL for $2,041.24. The cheque was deposited by PSCL and processed by CIBC, Toronto, Ontario, City.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the claimant, under the Travel Industry Act.

REASONS:

Based on the Reasons set out in Leue-Claimant, the Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decision in Leue-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim, namely: $2,441.24 less $50.00 tuition fee - less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

ARTHUR D. DAVIS, JR.

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATES OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS, BACKGROUND FACTS, AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto, background facts and the sequential events therein (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

SEQUENTIAL EVENTS:

The colourful brochure also came to the attention of Arthur D. Davis, Jr. (Claimant-Davis) of Green Bay, Wisconson. Davis was not a member of ABI. He was a life director of a National Organization. He received a brochure and obtained a invitation and Registration Form.

In February 1977, Davis on behalf of himself and his wife completed a Registration Form and mailed it together with a cheque payable to PSC for $400.00. The cheque was deposited by PSCL and processed by CIBC, Toronto Data Centre.

Davis mailed to Ottawa a cheque payable to PSCL for $2,011.24. The cheque was deposited by PSCL and processed by CIBC, Toronto, Ontario, City.

Davis produced a cheque for $30.00 to PSCL for visa handling.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the claimant, under the Travel Industry Act.

REASONS:

Based on the Reasons set out in Leue-Claimant, the Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordinglyentitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decision in Leue-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim, namely: $2,411.24 less $50.00 tuition fee - less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

DR. (and Mrs.) RAYMOND J. MAURER

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
MEDICAL SOCIETY OF SANTA BARBARA COUNTY

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto and the sequential events therein (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

BACKGROUND FACTS HEREIN:

The Medical Society of Santa Barbara County (Medical) is a state-mandated organization established to operate within the guidance of the California Medical Association and provides peer review procedures for County physicians, continuing medical education information dissemination and record maintenance for county physicians, empowered by the State of California to receive and entertain complaints against member physicians, and take such other responsibilities and tasks as are required under existing state law, regulations promulgated by the California Medical Association and other public benefits which can be provided for the county population in general and the physician community in particular. It is a corporation within the meaning of the California Corporations Code and its members are residents of California.

PASCO of Santa Barbara is a for-profit corporation which provides administrative services on a fee basis to Medical.

Medical was never registered under the Travel Industry Act of Ontario nor a participant in the Compensation Fund.

On 8th June 1976 Collins communicated with Robert Marvin (Marvin) Executive Director of Medical on 8th June 1976 (see Ex. 19b) PSCI logo (copy to Bryman):

"

> ...The following is PSC's proposal for the Medical Society of Santa Barbara County... Mr. Bryman wishes to offer to all doctors, their families and wives in California the Central Asia trip... The Medical Society...will receive the cash equivalent of one free seat for each 40 paying passengers, plus the registration fee (this can be $20, $25, or whatever sum you wish).
>
> ....
>
> All deposits and final payments will be sent to the office of the Medical Society.... These will be retained by you until shortly before departure and should be placed in a trust account. The registration forms will then be sent to the PSC office for processing. The registrants will receive the materials from the New York office. Since all monies will be retained in your trust account, refunds can be made simply on a day's notice to any registrant who wishes to cancel. Shortly before the tour departure, we will have an accounting and the Medical Society.... will simply retain the funds in their account due them (the cash equivalent of one free seat for each 40 paying

> passengers, plus registration fee, and the balance will be forwarded to the PSC office.
>
> ...Destinations such as Central Asia... are destinations which I am certain will sell and be very lucrative to the Medical Society of Santa Barbara.... "

Minutes of a meeting (Ex.77) show the agreement entered into.

The tour was to be so structured as to enable doctors to be entitled to tax credit. Medical played an active role to establish this.

Medical- PASCO - Marvin are synonymous.

An awareness by members of Medical and related persons with respect to a tour plan came about by the receipt of one or more items from a packet of 3 documents. (I-II-III)

I A "Dear Doctor" letter of information on the letterhead of Medical (Ex. 60) stating inter alia:

> " The Medical Society of Santa Barbara County, in conjunction with its Medical Education Foundation, is pleased to announce two travel-education tours abroad: a deluxe two week adventure to the Soviet Caucasuses plus Moscow and Kiev and a luxurious two week tour of India.
>
> ....
>
> We expect another great response to these programs and a standby list will be maintained on a first-come, first served basis in order of dates received. Apply early to avoid disappointment as many of your colleagues were turned away due to lack of space for your previous programs.
>
> If you plan to attend, complete the enclosed reservation form and send it with your deposit to the Medical Society of Santa Barbara County. All necessary trip information and visa application forms will be sent to you upon receipt of your deposit.

Should you require additional information, please contact Professional Seminar Consultants Ltd., 3194 Lawson Blvd., Oceanside, New York 11572 (516) 764-5100 or (613) 741-3700. You may also call Robert Marvin, Medical Society of Santa Barbara County Executive Director at (805) 965-5275."

....

"Bob Marvin"
Robert J. Marvin
Executive Director "

II A general colourful brochure (Ex. 47)

"TRANSCAUCASIAN ODYSSEY

with the following specifics added:

....

" INCLUDING MEDICAL CONFERENCES

....

YOUR INVITATION TO ATTEND A SOVIET AMERICAN CONFERENCE
ON COMPHRENSIVE MEDICINE
SPONSORED BY:
THE MEDICAL SOCIETY OF SANTA BARBARA COUNTY

FOR: PHYSICIANS, FAMILIES AND FRIENDS "

and on the back page, in fine print relating to general provisions:

" ....

RESPONSIBILITY: PSC Tours, Inc. and/or its Agent act(s) as Agent for the various companies whose accommodations.....

.... "

and at the bottom:

"

Program Arranged by:

PROFESSIONAL SEMINAR CONSULTANTS, LTD.

with a logo:

Member ASTA
American Society of Travel Agents "

III REGISTRATION FORM (Ex.61A)

SBCMS

The Medical Society of Santa Barbara County
9 East Pedregosa
Santa Barbara, Calif.

Gentlemen:

Please make the following reservations for me for the tour as sponsored by the Medical Society of Santa Barbara County.

....

MY NAME AND ADDRESS

....

ACCOMPANYING PARTY

....

PAYMENT (check one)

Enclosed you will find my check for $__________ which represents full payment for my entire party.

Enclosed you will find my cheque for $__________which represents a deposit of $200.00 for each member of my party.

NOTE: Make all checks payable to the MEDICAL SOCIETY OF SANTA BARBARA COUNTY. Please read and sign the conditions on the reverse side so that we may process your reservation. "

....

(on reverse side) CONDITIONS

....

SEMINARS: $25.00 Tuition Charge payable to
Medical Society of Santa Barbara County. "

....

All the details related to the trip are set out in the above three documents and many relevant details are repeated in each. The $25.00 tuition charge appears only in the Registration Form.

Up to this time Medical through Marvin had performed many acts which a travel agent would in the ordinary course perform in arrangements for a tour, such as preparation of the above material, mailing list, receiving registrations, etc. Material was prepared by using as precedents material from other group tours with appropriate changes being made.

SEQUENTIAL EVENTS

The packet came to the attention of Dr. Raymond J. Maurer (Maurer) a member of the similiar association for Orange County, and a member of the California Medical Association.

On the 11th day of October 1976, Maurer forwarded a cheque to Medical at Santa Barbara for $200.00 "for your April, 1977 trip to Russia to ensure a reservation for my wife and myself".

The cheque is endorsed:

" Pay to the order of
PASCO of Santa Barbara
"Robert Marvin"
Robert Marvin, Executive Director
Medical Society of Santa Barbara County

....

Pay to the order of
Glendale Federal Savings & Loan
Santa Barbara Office
For Deposit Only
PASCO of Santa Barbara - Tour Fund "

The sum of $200.00 less $25.00 is included as part of a total of amounts paid to PSCL in a cheque dated March 23, 1977 in the amount of $19,352.00 which amount was deposited in PSCL's bank account in Vanier, Ontario and cleared PASCO's account on April 1, 1977.

On the 29th October 1976 Maurer received a letter (Ex. 49) from Marvin on the letterhead of Medical which stated inter alia:

> " Dear Doctor Maurer:
> We are pleased to have received your reservation request and deposit for the medical society-sponsored tour to Russia.
>
> ....
>
> Professional Seminar Consultants Ltd., the agency that has made arrangements for the trip, will be sending you confirmation of your reservation and additional information within the next week.
>
> Your letter dated October 11, 1976 did not give a departure date for April. Kindly drop this information in the self-addressed envelope enclosed.
>
> ....
>
> If you have any further questions regarding specific aspects of the tour, please direct your inquiries to:
> Professional Seminar Consultants Ltd.
> 3194 Lawson Boulevard
> Oceanside, New York 11572
> call New York (516) 764-5100
> or Ottawa (613) 741-3700 "

By November 2nd (Ex.50C) Maurer acknowledged the 29th October letters and advised Marvin of the departure date, and requested a double bed.

On November 8th (Ex.51) Marvin acknowledged the foregoing saying:

> "I have sent your request to Professional Seminar Consultants and they will notify you and attempt to make special bedding arrangements for you....Please contact Professional Seminar Consultants Ltd. if there are any questions regarding other arrangements."

On 16th November, 1976 PSCL (triple address - no PSC logo) (Ex.52A in the form of Leue Ex.22 LE7) wrote Maurer an acknowledgement letter regarding "Tour - SBCMS". The Ottawa address box was ticked for reply. Up to this time Maurer had no knowledge that PSCL was an Ontario company.
Also enclosed were:
- a colour sheet (photostat) (Ex.52(b)) headed "Trip Information For"
- travel insurance ("Trip Travel and Baggage Protector") application forms identified with PSCI with a New York address and the cheque to be paid to PSCI
- miscellaneous information sheets (some in English on one side, French on other)

On 22nd February, 1977 Maurer received a letter "To All Participants in the Transcaucasian Odyssey" (Ex.54a) (triple address - no PSC logo) with Ottawa address ticked off re the change in departure date with

- a bill enclosed (Ex. 54B).

"

PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Dr. & Mrs. Maurer
STATEMENT
TRANSCAUCASION ODYSSEY APRIL 27 - MAY 11, 1977

Cost of tour	$1295.00		
10% tax & service	129.50		
Registration fee	25.00		
Visa handling	15.00		
Total	1464.50	x 2	$2929.00
LESS DEPOSIT			400.00
BALANCE			2529.00
LESS	15.00 x 2		30.00
BALANCE			2499.00

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

Mauer issued a cheque for $2499.00 payable to PSC; it was negotiated by PSCL at CIBC Vanier.

On March 11th, 1977, PSCL (triple address) advised Maurer - "Dear Participant" of the increase ($36.37) in fare. On March 23rd, 1977, Maurer issued a cheque payable to PSC for $72.74; it was deposited by PSCL and processed by the CIBC Vanier.

Among the documents (Ex. 57) produced at the hearing were:

- wallet
- 5 Baggage tags (PSCL Ottawa)
- 2 name tags
- USSR custom declarations
- USSR visas
- a notice re return of passports and Visas (PSCI)
- an itinerary (Ex.58)

Maurer paid $30.00 on 2-2-77 to PSC deposited by PSCL and processed by CIBC Vanier.

On the 14th April, 1977, PSCL (Ex. 56A) advised Maurer - "Dear Registrant" of the licence revocation due to insolvency. The Ottawa address envelope was postmarked Oceanside.

After Medical was notified of the cancellation of the tour, it forwarded to Maurer a refund of $50.00.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the client under the Travel Industry Act of Ontario.

REASONS HEREIN:

The Tribunal incorporates into this decision its reasons as set out in the matter of Leue-Claimant, except as varied or added thereto.

The Tribunal is of the opinion that the actions of Medical herein do not constitute "carrying on the business of selling to the public travel services provided by another person". Medical did not intend its actions to be such, nor did the claimant understand its actions as such. The receipt by Medical of the $25.00 tuition charge and other remuneration, direct and indirect, does not make the actions a carrying on of business.

The Tribunal finds that Medical was not acting as a travel agent herein. Accordingly Medical was not a "unregistered" travel agent.

Unlike in Leue-Claimant the three item packet did not make it clear that a relationship was to be established with PSCL. The subsequent correspondence Mauer-Marvin indicates that, the relationship between Mauer-Medical is that of member-association and that a relationship is to be established with PSCL. The acknowledgement letter combined with the billing and payment thereof leads the Tribunal to the same finding, namely that a contractual relationship had been established between Maurer and PSCL.

The Tribunal finds that the claimant was a client of PSCL.

The Tribunal finds a contractual relationship had been established between the claimant and PSCL for the travel services established in total by the various communications. The Tribunal finds that the claimant (a client) had contracted with a participant for travel services.

The Tribunal finds also that claimant (client) made payment to a participant in Ontario. That the registration cheque had initially been made out to Medical and endorsed to PASCO and negotiated by PASCO in Calfornia is not of consequence in the light of the Tribunal's finding as to the contract. Medical was acting on behalf of Maurer in the process of making a deposit with respect to the trip.

The Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decision in Leue-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim namely: $2,751.74 less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

JEANNINE J. LEGLER, M.D.

APPEAL FROM THE DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIM OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
MEDICAL SOCIETY OF SANTA BARBARA COUNTY

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS, BACKGROUND FACTS, AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto, and the sequential events therein, and the same as in the matter of Claimant-Maurer in Re: Professional Seminar Consultants Ltd. and Medical Society of Santa Barbara County (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

SEQUENTIAL EVENTS

The packet came to the attention of Dr. Jeannine J. Legler a member of the similiar association for Riverside County, and a member of the California Medical Association.

On the 7th day of September 1976, Legler forwarded a cheque to Medical at Santa Barbara for $400.00 as deposit for self and Rita Galligan.

The cheque is endorsed:

"
Pay to the order of
PASCO of Santa Barbara
"Robert Marvin"
Robert Marvin, Executive Director
Medical Society of Santa Barbara County
....
For Deposit Only
Glendale Federal Savings & Loan Association

The sum of $200.00 less $25.00 (each deposit) is included as part of a total of amounts paid to PSCL in a cheque dated March 23, 1977 in the amount of $19,352.00 which amount was deposited in PSCL's bank account in Vanier, Ontario and cleared PASCO's account on April 1, 1977.

On 22nd February, 1977 Legler received a letter (Ex.96) (triple address - no PSC logo) with Ottawa address ticked off re the change in departure date with - a bill enclosed (Ex. 98).
"

PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Dr. Legler
STATEMENT
TRANSCAUCASIAN ODYSSEY APRIL 27 - MAY 11, 1977

Cost of tour	$1295.00
10% tax & service	129.50
Registration fee	25.00
Visa handling	15.00
Total	1464.50
LESS DEPOSIT	200.00
BALANCE DUE	1264.50

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

Legler issued a cheque for $1249.00 payable to PSC; it was deposted to the credit of PSCL and processed by CIBC Vanier.

On March 11th, 1977, PSCL (triple address) advised Legler - "Dear Participant" of the increase ($36.37) in fare. On March 24th, 1977, Legler issued a cheque payable to PSC for $36.37; it was deposited by PSCL and processed by the CIBC Vanier.

Legler paid $15.00 on 28-2-77 to PSC deposited by PSCL and processed by CIBC Vanier.

On the 14th April, 1977, PSCL (Ex.103) advised Legler - "Dear Registrant" of the licence revocation due to insolvency.

After Medical was notified of the cancellation of the tour, it forwarded to Legler a refund of $25.00.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the client under the Travel Industry Act of Ontario.

REASONS HEREIN:

Based on the Reasons set out in Claimant-Maurer, the Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decision in Leue-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim namely: $1,475.87 less $15.00 visa handling fee - less $3.00 tax - less $13.00 wallet - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

GERALD F. SEVERIN (and Mrs. Charlotte W.)

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
MEDICAL SOCIETY OF SANTA BARBARA COUNTY

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT, representing the Appellants

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF HEARING: 22nd, 23rd, 26th-29th, July 1982
31st May, 1984
1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS, BACKGROUND FACTS, AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California attached hereto, and the sequential events therein, and the same as in the matter of Claimant-Maurer in Re: Professional Seminar Consultants Ltd. and Medical Society of Santa Barbara County (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

SEQUENTIAL EVENTS

The packet came to the attention of Gerald F. Severin (Severin) a member of Medical in August 1976.

On the 9th day of September 1976, Severin forwarded a cheque to Medical at Santa Barbara for $400.00 "trip deposit - Transcaucasian Odyssey".

The cheque is endorsed:

> " Pay to the order of
> PASCO of Santa Barbara
> "Robert Marvin"
> Robert Marvin, Executive Director
> Medical Society of Santa Barbara County
> ....
> Pay to the order of
> Glendale Federal Savings & Loan
> Santa Barbara Office
> For Deposit Only
> PASCO of Santa Barbara - Tour Fund "

The sum of $200.00 less $25.00 is included as part of a total of amounts paid to PSCL in a cheque dated March 23, 1977 in the amount of $19,352.00 which amount was deposited in PSCL's bank account in Vanier, Ontario and cleared PASCO's account on April 1, 1977.

On the 14th September 1976 Severin received a letter (same as Maurer-Claimant) (Ex.65) from Marvin on the letterhead of Medical which stated inter alia:

> " Dear Doctor Severin:
> We are pleased to have received your reservation request and deposit for the medical society-sponsored tour to Russia.
>
> ....
>
> Professional Seminar Consultants Ltd., the agency that has made arrangements for the trip, will be sending you confirmation of your reservation and additional information within the next week.
> Your letter dated October 11, 1976 did not give a departure date for April. Kindly drop this information in the self-addressed envelope enclosed.
>
> ....

If you have any further questions
regarding specific aspects of the tour,
please direct your inquiries to:
Professional Seminar Consultants Ltd.
3194 Lawson Boulevard
Oceanside, New York 11572
call New York (516) 764-5100
or Ottawa (613) 741-3700 "

On 23rd September 1976 PSCL (triple address - no PSC logo) (Ex.66B in the form of ABI Ex.22 LE7) wrote Mr. and Mrs. Severin an acknowledgement letter regarding "Tour - SBCMS". The Ottawa address box was ticked for reply. Up to this time Severin had no knowledge that PSCL was an Ontario company. The envelope was postmarked Ontario.
Also enclosed were:

- a colour sheet (Ex.66(c)) PSC logo headed "Trip Information For"
- miscellaneous information sheets (some in English on one side, French on other)
- Memos re passports and visas (PSCI)

On 2 February 1977, Severin paid $30.00 by cheque to PSCI deposited by PSCL and processed by CIBC Vanier.

On 22nd February, 1977 Severin received a letter "To All Participants in the Transcaucasian Odyssey" (Ex.68a) (triple address - no PSC logo) with Ottawa address ticked off re the change in departure date with
- a bill enclosed (Ex. 68b).

" PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Dr. & Mrs. Severin
STATEMENT
TRANSCAUCASIAN ODYSSEY APRIL 27 - MAY 11, 1977

Cost of tour	$1295.00		
10% tax & service	129.50		
Registration fee	25.00		
Visa handling	15.00		
Total	1464.50	x 2	$2929.00
LESS DEPOSIT			400.00
BALANCE			2529.00
LESS	15.00 x 2		30.00
BALANCE			2499.00

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

On March 9th, Severin issued a cheque for $2499.00 payable to Medical; it was negotiated in the manner that the deposit cheque was and is included in the $19,352.20 forwarded by Pasco.

On March 11th, 1977, PSCL (triple address) advised Severin - "Dear Participant" of the increase ($36.37) in fare.

A Bill to Dr. and Mrs. G. Severin (Ex.69b) showed a balance of $2571.74 due. A copy of this bill is marked "Paid" 3/24/77 by Kay (a secretary of Medical). On March 2 , 1977, Severin issued a cheque payable to Medical for $72.74; it was endorsed and deposited by PSCL and processed by the CIBC Vanier.

Among the documents (Ex.71) produced at the hearing were:

- wallet
- 5 Baggage tags (PSCL Ottawa)
- 2 name tags
- USSR custom declarations
- USSR visas
- an itinerary

On the 14th April, 1977, PSCL (Ex. 56A) advised Severin - "Dear Registrant" of the licence revocation due to insolvency. The Ottawa address envelope was postmarked Oceanside.

After Medical was notified of the cancellation of the tour, it forwarded to Severin a refund of $50.00.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the client under the Travel Industry Act of Ontario.

REASONS HEREIN:

The Tribunal incorporates into this decision its reasons as set out in the matter of Maurer-Claimant, except as varied or added thereto.

The Tribunal is of the opinion that the actions of Medical herein do not constitute "carrying on the business of selling to the public travel services provided by another person". Medical did not intend its actions to be such, nor did the claimant understand its actions as such. The receipt by Medical of the $25.00 tuition charge and other remuneration, direct and indirect, does not make the actions a carrying on of business.

The Tribunal finds that Medical was not acting as a travel agent herein. Accordingly Medical was not a "unregistered" travel agent.

The acknowledgement letter combined with the billing and payment thereof leads the Tribunal to the same finding, namely that a contractual relationship had been established between Maurer and PSCL.

The Tribunal finds that the claimant was a client of PSCL.

The Tribunal finds a contractual relationship had been established between the claimant and PSCL for the travel services established in total by the various communications. The Tribunal finds that the claimant (a client) had contracted with a participant for travel services.

The Tribunal finds also that claimant (client) made payment to a participant in Ontario. That the registration cheque had initially been made out to Medical and endorsed to PASCO and negotiated by PASCO in Calfornia is not of consequence in the light of the Tribunal's finding as to the contract. Medical was acting on behalf of Severin in the process of making a deposit with respect to the trip.

That the balance payment was as set out above does not affect this finding. Medical was acting on behalf of Severin in collecting and forwarding this payment.

The Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decisions in Claimant-Leue.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim namely: $2,951.74 less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

DR. AND MRS. FREDERICK F. CRUTCHER

APPEAL FROM THE DECISIONS OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIMS OF THE CLAIMANTS

TO BE NOT ELIGIBLE FOR PAYMENT

IN RE:	PROFESSIONAL SEMINAR CONSULTANTS LTD. and ALAMEDA COUNTY DENTAL SOCIETY
TRIBUNAL:	JOHN YAREMKO, Q.C., CHAIRMAN WATSON W. EVANS, MEMBER MARGARET DONALD, MEMBER
COUNSEL:	SAMUEL R. RICKETT, representing the Appellants MICHAEL D. LIPTON, Q.C., representing the Respondent
DATE OF HEARING:	22nd, 23rd, 26th-29th, July 1982 31st May, 1984 1st, 4th, 5th, June, 1984

REASONS FOR DECISION AND ORDER

CORPORATE FINDINGS AND SEQUENTIAL EVENTS:

The corporate findings of the Tribunal relating to Professional Seminar Consultants, Ltd. (PSCL), Professional Seminar Consultants Inc. (PSCI) and PSC Tours Inc. (PSCTI), and Professional Seminar Consultants (PSC) are as in the matter of Leue-Claimant in Re: Professional Seminar Consultants Ltd. and Associated Building Industry of Northern California and as in the matter of Maurer-Claimant in re: Professional Seminar Consultants, Ltd. and Medical Society of Santa Barbara County attached hereto and the sequential events therein (except as to detail) are incorporated herein, except insofar as they are otherwise specifically described and/or distinguished.

BACKGROUND FACTS HEREIN:

Alameda County Dental Society (Dental) is an organization mandated by the State of California established to operate within the guidance of the California Dental Association and provides peer review procedures for County dentists, continuing dental education information dissemination and record maintenance for County dentists, empowered by the

State of California to receive and entertain complaints against member dentists, and take such other responsibilities and tasks as are required under existing state law, other public benefits which can be provided for the county population in general and the dental community in particular. Its members are dentists practising within the County of Alameda, California, and are resident in the State of California.

Dental is not registered under the Travel Industry Act of Ontario.

In early fall of 1976 Dental (Grayson Executive Secretary) and PSCL, H. Robert Bryman, President (Bryman - Oceanside 3194) entered into an agreement re PSC Ltd. travel (Exhibit 106a) which embodied the remuneration, compensation and other consideration for which Dental "would offer all tours of P.S.C., Ltd...." It further noted "that any liability arising out of actions of P.S.C. Ltd., by failure to provide travel as advertised shall be the liability of P.S.C., Ltd., and not the alameda County Dental Society.

An awareness by members of Dental and related persons with respect to a tour plan came about by the receipt of one or more items of a packet of 3 documents (I-II-III)

I A "Dear Colleague" letter of information on the letterhead of Dental (Exhibit 115) stating inter alia:

> " We are pleased to announce two additional programs in our continuing series of travel-educational tours abroad conducted by Professional Seminar Consultants, a repeat of our highly successful Transcaucasian Odyssey and a most deluxe professional tour to India.
>
> ....
>
> We expect another great response to these programs and a standby list will be maintained on a first-come, first-served basis in order of dates received. Apply early to avoid disappointment as many of your colleagues were turned away due to lack of space for our previous programs.

If you plan to attend, complete the enclosed reservation form and send it with your deposit to the Alameda County Dental Society. All necessary trip information and visa application forms will be sent to you upon receipt of your deposit.

Should you require additional information, please contact Professional Seminar Consultants Ltd., 3194 Lawson Blvd., Oceanside, New York 11572 (516) 764-5100 or (613) 741-3700. You may also call Helen Grayson, the Alameda County Dental Society Secretary, at (805) 523-5878."

....

"Louis S. Vodzak, D.D.S."
Louis S. Vodzak, D.D.S.
President, Alameda County Dental Society

"Arthur L. Gagnier, D.D.S."
Arthur L. Gagnier, D.D.S.
Secretary, Alameda County Dental Society

II A general colourful brochure (Exhibit 110)

TRANSCAUCASIAN ODYSSEY

with the following specifics added:

" INCLUDING DENTAL CONFERENCES
....
Your invitation to attend a Soviet/American Conference
on Comprehensive Dentistry
OFFERED BY THE
ALAMEDA COUNTY DENTAL SOCIETY

FOR: DENTISTS, THEIR FAMILIES AND FRIENDS "

and on the back page, in fine print relating to general provisions:

" ....

RESPONSIBILITY: PSC Tours, Inc. and/or its Agent act(s) as Agent for the various companies whose accommodations.....

....

and at the bottom:

Program Arranged by:

PROFESSIONAL SEMINAR CONSULTANTS, LTD.

with a logo:

Member ASTA
American Society of Travel Agents "

III

REGISTRATION FORM

ACDS (Ex.109A)

Alameda County Dental Society
1516 Oak St., Alameda, Calif.
Att: Helen Grayson

Gentlemen:

Please make the following reservations for me for the tour as offered by the Alameda County Dental Society.

....

MY NAME AND ADDRESS

....

ACCOMPANYING PARTY

....

PAYMENT (check one)

Enclosed you will find my check for $__________ which represents full tuition and payment for my entire party.

Enclosed you will find my cheque for $__________ which represents a deposit of $200.00 for each member of my party...

NOTE: Make all checks payable to the Alameda County Dental Society. Please read and sign the conditions on the reverse side so that we may process your reservation. "

....

(on reverse side) CONDITIONS

....

SEMINARS: $25.00 Tuition Charge made payable to A.C.D.S."

....

All the details related to the trip are set out in the above three documents and many relevant details are repeated in each. The $25.00 tuition charge appears only in the Registration Form.

Up to this time Dental through Grayson had performed many acts which a travel agent would in the ordinary course perform in arrangements for a tour, such as preparation of material, mailing list, receiving registrations, etc. Material was prepared by using as precedents material from other group tours with appropriate changes being made.

SEQUENTIAL EVENTS

The packet came to the attention of Dr. Fred F. Crutcher (Crutcher).

On the 9-8-1976, Crutcher forwarded a cheque for $400.00 payable to and cashed by Dental by deposit into its bank account in California.

Ex. 111 is a copy of a letter dated March 29, 1977 which was mailed by Dental to PSCL at their address in Ottawa, Ontario enclosing a cheque in the amount of $1,575.00 representing the $200.00 per person deposit required from each registrant less a $25.00 per person registration fee which was retained by Dental and stating the names of the registrants in whose behalf the funds were forwarded, including that of Crutcher.

On 24th September, 1976 PSCL (triple address - no PSC logo) (Ex.118 in the form of exhibit - Leue 22LE7 and Maurer 52A) wrote the acknowledgment letter to Crutcher regarding "Tour - ACDS - CM". The Ottawa address box was ticked for reply. Up to this time Crutcher had no knowledge that PSCL was an Ontario company.
Also enclosed were:
- a colour photo sheet (Ex.119) headed "Trip Information For"
- travel insurance ("Trip Travel and Baggage Protector") application forms identified with PSCI with a New York address and the cheque to be paid to PSCI
- miscellaneous information sheets (Ex.120, 123, 125) (with English on one side, French on other)

On 22nd February, 1977 Crutcher received a letter "To All Participants in the Transcaucasion Odyssey" (Ex.128a) from PSCL (triple address - no PSC logo) with Ottawa address ticked off re the change in departure date with
- a bill enclosed (Exhibit 128B).

" PROFESSIONAL SEMINAR CONSULTANTS Ltd.
Liaison for International Professional Education
Dr. & Mrs. Crutcher
STATEMENT
TRANSCAUCASIAN ODYSSEY APRIL 27 - MAY 11, 1977

Cost of tour	$1295.00	
10% tax & service	129.50	
Registration fee	25.00	
Visa handling	15.00	
Total	1464.50	x 2 $2929.00
LESS DEPOSIT		425.00
BALANCE		2504.00
LESS	15.00 x 2	30.00
BALANCE		2474.00

NOTE:
FINAL PAYMENTS FOR ALL TRIPS
ARE DUE NO LATER THAN SIX
WEEKS BEFORE DATE OF DEPARTURE
VANIER MEDICAL CENTRE
261 MONTREAL ROAD, OTTAWA, ONTARIO K1L 8C7"

Crutcher issued a cheque to PSCL for $2474.00 and sent it to PSCL (Ottawa) address). It was negotiated by PSCL at CIBC Vanier.

Crutcher received:
- Visa application forms and instructions (Ex. 124) and an "Important Notice" (Ex. 122) re returning of passports and visas with address PSCI, Oceanside 3194 with instructions to send $15.00 per application to PSCI.

Crutcher issued a cheque 12-10-76 to PSCI for $30.00 processed at CIBC Toronto. Crutcher received USSR Visas.

On March 11th, 1977, PSCL (triple address) advised Crutcher - "Dear Participant" of the increase ($36.37) in fare. On March 18, 1977 Crutcher sent to PSC Ottawa a cheque payable to PSC for $72.74; it was processed by the CIBC Vanier.

On the 14th April, 1977 PSCL (Ex. 135) advised Crtucher - "Dear Registrant" of the licence revocation due to insolvency. The Ottawa address envelope was postmarked Oceanside.

After Dental was notified of the cancellation of the tour, it forwarded to Crutcher a refund of $50.00.

The claim herein is based on a refusal by the Trustees to pay the claim for a refund of monies paid by the claimant, under the Travel Industry Act.

REASONS HEREIN:

The Tribunal incorporates into this decision its reasons as set out in the matter of Leue-Claimant and Maurer-Claimant, except as varied or added thereto.

The Tribunal is of the opinion that the actions of Dental herein do not constitute "carrying on the business of selling to the public travel services provided by another person". Dental did not intend its actions to be such, nor did the claimant understand its actions as such. The receipt by Dental of the $25.00 tuition charge and other remuneration, direct and indirect, does not make the actions a carrying on of business.

The Tribunal finds that Dental was not acting as a travel agent herein. Accordingly Dental was not a "unregistered" travel agent.

Unlike in Leue-Claimant the three item packet did not make it clear that a relationship was to be established with PSCL and there was no subsequent correspondence as in Claimant-Maurer. The Tribunal finds the relationship between Crutcher-Dental that of member-association The acknowledgement letter combined with the billing and payment thereof leads the Tribunal to the same finding, namely that a contractual relationship had been established between Crutcher and PSCL.

The Tribunal finds that the claimant was a client of PSCL.

The Tribunal finds a contractual relationship had been established between the claimant and PSCL for the travel services established in total by the various communications. The Tribunal finds that the claimant (a client) had contracted with a participant for travel services.

The Tribunal finds also that claimant (client) made payment to a participant in Ontario. That the registration cheque had initially been made out to Dental and negotiated by Dental in Calfornia and included in a cheque Dental to PSCL (Ex. 105 last page) is not of consequence in the light of the Tribunal's finding as to the contract. Dental was acting on behalf of Crutcher in the process of making a deposit with respect to the trip.

The Tribunal is of the opinion that the claimant herein is a "client who has made payment to a participant in Ontario for travel services" and is accordingly entitled to claim for a refund of monies paid for travel services.

In respect of the issue of disputes as to what constitutes a travel service, the Tribunal adopts its decisions in Leue-Claimant and Maurer-Claimant.

The Tribunal reiterates its decision Re Battista (Strand Holidays) 10 C.R.A.T., p.156 and in Re Armstrong (Lawson McKay Tours) 11 C.R.A.T., p. 212.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act, the Tribunal allows part of the claim namely: $2,926.74 less $30.00 (2 x 15.00) visa handling fee - less $6.00 tax - less $26.00 wallets - and directs the Board of Trustees to pay the amount allowed.

The Tribunal is of the opinion that the claim should be paid in U.S. Currency at the rate of exchange prevailing on the 15th April 1977.

MARIANNE SMITH

APPEAL FROM THE DECISION OF THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT DETERMINING THE
CLAIM OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
GLORIA ANEVICH, MEMBER

COUNSEL: MARIANNE SMITH, appearing in person

MICHAEL D. LIPTON, Q.C., representing the Respondent

DATE OF
HEARING: 14th June, 1984

REASONS FOR DECISION AND ORDER

The claim is for the sum of $2,524.00 for travel services paid to a participant. In order to succeed the claimant must bring herself within the provisions of regulation 15(1) paragraph 1 which states a "client who has made payment for travel services to a participant". In this matter the claimant must (a) prove payment (b) prove the payment was for travel services.

The claimant relates the validity of her claim to two receipts exhibit 9A, dated June 17th, 1977 for $100.00 and exhibit 9B, dated July 16th, 1977 for $2,424.000. The claimant states that those two receipts are in relationship to certain payments made by her which she maintains are supported by her production of some 24 cheques, over a period of time from January 19th, 1977 to July 8th, 1977. Twenty-three of the cheques are made payable to Cash and the last cheque of July 8th, (Ex. 7X) for $303.20 was payable to Information and Travel Centre.

The claimant has asserted that payment was made by cash to the participant, which cash became available by the cashing of the 'Cash' cheques at her own bank by her daughter, delivering to the claimant and then in turn paid by her to the participant. There is nothing in the 23 cheques made to cash which would in any way support the assertion by the claimant with one exception.

There is a receipt dated the 17th of June, 1977 for $100.00 cash related to Dep. 2x Apex fares Toronto-Berlin. That receipt shows a balance of $740.00 which is patently incorrect because the deposit is in relation to two fares.

In explanation of why she gave cash during all that period the claimant said that the participant being in financial difficulty was not able to make deposits because the bank would then take that money for debts owing. However, it is to be noted that the participant made deposits both of cash and cheques until July 15. Having produced the cheque and received the receipt of June 17th (which shows the incorrect balance) the claimant continued to pay as she claims five more payments in cash based on her production of exhibits 7S to W for sums totalling $250.00, one being in the amount of $200.00 three days after receiving a receipt June 17th showing an incorrect balance, for which she did not see fit to get a receipt.

There can be a reasonable doubt about the assertion that these cheques formed the basis for payment to the participant. There is, of course, the one cheque of $303.20.

Even assuming that the payments were in fact made to a participant, there still remains the issue of whether the payments were for travel services. In the ordinary course receipts such as issued June 17th and July 16th are acceptable in proof of payment; however, the validity of receipts issued by this participant is such that they cannot necessarily be taken for their face value.

So too with the issuance of cheques in the ordinary course made payable to a participant. In this instance there is nothing to relate the cheque for $303.20 to a payment for travel services. It is for an odd amount unrelated to any computation respecting items of travel service. It was not deposited; it was negotiated for cash. The receipt of June 17th had an error in balance. At a time when, based on the cashed cheques, it would have appeared that a substantial portion of the fares that had been contracted for had been paid, and the July 8th cheque was so close in total to the amount due and paid, one would expect that the receipt which is dated July 16th would have been issued as of July 8th.

The Tribunal finds that the claimant has not discharged the onus upon her that the sums in respect of which she has placed evidence before the Tribunal were payments for travel services to a participant.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Schedule to Regulation 938 under the Travel Industry Act the Tribunal refuses to allow the claim.

STARBURST HOLIDAYS INC. operating as
DOUGLAS TRAVEL and as TRAVELER'S TREE

APPEAL FROM THE ORDER AND PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO TEMPORARILY SUSPEND THE REGISTRATIONS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
ART GARNER, MEMBER

COUNSEL: LAWRENCE THETRAULT, its Agent

A. N. MAJAINA, representing the Respondent

DATE OF
HEARING: 27th September, 1984

CONSENT ADJOURNMENT AND ORDER

WHEREAS the Tribunal by its Notice of Hearing, dated 24th September, 1984, appointing a time and place for a hearing in the above matter commencing 27th September, 1984,

UPON the matter coming before the Tribunal and upon the request for an adjournment by the Appellant and the concurrence of counsel for the Registrar, subject to the condition that the Appellant obey the aforesaid Order and refrain from carrying on business in any manner,

The Tribunal orders as follows:

The Tribunal hereby extends the temporary suspension herein until the hearing hereinbefore requested, be convened and concluded.

This hearing is therefore adjourned sine die to be brought back on seven days' notice one party to the other or to a date to be fixed by the Registrar.